

**IN THE HIGH COURT OF JUDICATURE AT HYDERABAD  
FOR THE STATE OF TELENGANA AND THE STATE OF ANDHARA PRADESH**

\*\*\*

**CIVIL REVISION PETITION No.6089 of 2016**

Between:

V. Rama Naidu and another

.....Petitioners

and

Smt. V.Ramadevi

.....Respondent

Date of Judgment pronounced on : 31-01-2018

**HON'BLE DR. JUSTICE B. SIVA SANKARA RAO**

1. Whether Reporters of Local newspapers : Yes/No  
May be allowed to see the judgments?
2. Whether the copies of judgment may be marked : Yes/No  
to Law Reporters/Journals:
3. Whether The Lordship wishes to see the fair copy : Yes/No  
Of the Judgment?

**\* HON'BLE DR. JUSTICE B. SIVA SANKARA RAO**

**+ CIVIL REVISION PETITION No.6089 of 2016**

% 31-01-2018

**Between:**

# V. Rama Naidu and another

.....Petitioners

And

\$ Smt. V.Ramadevi

.....Respondent

**< GIST:**

**> HEAD NOTE:**

! Counsel for the petitioners : Sri V.S.R. Anjaneyulu

^ Counsel for the respondent : Sri L.J. Veera Reddy

**? Cases referred**

1. 1985(4) SCC 92 =AIR-1985 SC-1729(A) Para 9
2. 2005 (2) ALD 230 (FB)
3. 2003-CrLJ-2033= (4)SCC-601
4. 2003(3) ILD-505(Karnataka)
5. CRP.No.337 of 2016, dated 19-10-2016
6. 1977(1) SCC-750=AIR-1977-SC-265 at 274
7. AIR-1966-SC-1678=1966(3)SCR 466
8. 1976(2) SCC = AIR 1976 SC 997
9. 1988(3) SCC 366=AIR-1988-SC-1381
10. AIR-1964-Bombay 38
11. AIR-1974-Rajasthan 31
12. AIR-1983-AP-14=1983(1)ALT-39
13. 2015 (4) ALT 665
14. 2013(2) ALT 784
15. 2008 (2) ALT 463
16. C.R.P.No.2046 of 2016, dt.03-06-2016
17. 1995 (1) ALT 305
18. AIR-1982-Karnataka-81
19. AIR-1978-AP-103
20. 1968 AIR Calcutta 532 at 537
21. AIR 1939 Cal. 657
22. AIR 1949 Mad.689 at 690
23. AIR 1953- Nag.-169
24. 1989 Supp(1) SCC 377=AIR-1989-SC-705 at 710 Para -11
25. AIR-1973-Punjab-210
26. AIR-1967-AP-202 at Para-D
27. AIR-1972-SC-2639
28. AIR-1966-SC-1072=1963(2)SCR-348
29. AIR 1987 Bombay 87(B)
30. AIR 1964 SC-962=1964(6) SCR 330
31. AIR 2003 SC 1971
32. AIR 2004 SC 4082
33. AIR 1936-Lahore 114

34. 23 (Indian Appeals) page 106 (privy council) year-1896
35. 1964 R.L.W. page 264
36. AIR 1966 Allahabad page 84 (F.B.) at page 87
37. ILR 5 Allahabad page 163
38. 39 Indian appeals page 218
39. 1976(1) SCC 120 = AIR 1976 SC 1152
40. AIR 2001 SC 1158
41. 2003(6) SCC -641
42. 2011 (5) ALD 149 (SC)
43. 2005 (6) SCC 344
44. 2007 (1) ALT 230
45. 2006 (5) ALD 823
46. 2007 (1) ALD 515
47. 2016 (3) ALD 516



**HON'BLE DR. JUSTICE B. SIVA SANKARA RAO****CIVIL REVISION PETITION No.6089 of 2016****ORDER:**

The revision petitioners are defendants in O.S.No.547 of 2011 on the file of Principal Senior Civil Judge, Chittoor, and the revision respondent is the sole plaintiff.

2. The suit filed is for the relief of specific performance of the contract for sale dated 23.10.2010 and in the alternative for refund of the advance amount of Rs.1,00,000/- with interest from the sale agreement till date of its recovery with costs of suit and for such other reliefs. The plaint schedule property consists of total Ac.1-94 ¼ cents of Kondepalle Gram Panchayat, GD Nellore Mandal, Chittoor District in S.Nos.62, 70/3A, 70/4, 71, 72/1, 73/7, 73/9, 99 & 106 out of the full extents put together supra. Along with plaint filed in November 2011 the documents filed are sale agreement supra, legal notice, reply, rejoinder, reply and proof of service. The defendants contest is that the suit sale agreement is a rank forgery and it was never executed and not signed by the defendants and they received no advance and never agreed to sell the property or any portion thereof much less to plaintiff and it is a spur document created by husband of plaintiff in the name of the plaintiff after knowledge about the registered sale dated 26.06.2011 executed by the 1<sup>st</sup> defendant and his wife in favour of the 2<sup>nd</sup> defendant-V.Chinchu Naidu for Rs.2,70,000/- having received consideration pursuant to the sale and put in possession and because of family differences between the plaintiff's husband and the 1<sup>st</sup> defendant in respect of some dry land, plaintiff's husband created the so called agreement to black

mail the 1<sup>st</sup> defendant and other contentions. The suit from the respective pleadings and issues was in the progress of trial. The plaintiff as PW.1 filed in chief examination and it is coming for cross examination of PW.1 from 01.09.2016 where chief affidavit was taken on oath and Exs.A1 to A13 marked and after filing of chief affidavit a petition for appointment of advocate commissioner filed and on 01.09.2016 one P.Balasubramanyam, advocate is appointed as commissioner to record cross examination of PW.1 and fee of Rs.600/- payable by both parties. Subsequently the commissioner neither executed the warrant nor returned when the matter was so coming and said advocate P.Balasubramanyam warrant is cancelled and another advocate G.Saleem is appointed in his place to execute the warrant, which is also with no progress. It is said commissioner appointment for cross examination of PW.1 impugned in the revision.

3. The grounds of revision are that the impugned order of the court below is contrary to law and probabilities of the case and the approach in appointment of advocate commissioner suo motu is unsustainable and is against the settled principles of law that advocate commissioner cannot be appointed suo motu that too where substantial issues have to be decided and from the contest by the defendants of the said sale agreement dated 23.10.2010 is a rank forgery and not signed and they did not receive any consideration and never agreed to sell and thereby the impugned order of the Court appointing advocate commissioner is liable to be set aside. The learned counsel for the revision petitioners reiterated the same and the learned counsel for the respondent supported the impugned order.

4. In the course of hearing several aspects on the scope of suo motu appointing of advocate commissioner raised as to how to accept an affidavit in chief examination if any portion is inadmissible on the inception of affidavit averments on the exercise of oath and the security to the documents if at all to give to the commissioner for purpose of recording evidence etc., by both parties requesting to pass a detailed order touching all these aspects to solve the day to day problems in this regard.

5. Heard and perused the material on record and the impugned order in the grounds of revision and the relevant provisions and propositions.

6. Before coming to the factual matrix further in answering the lis, coming to the legal position on the law of evidence and reception of affidavit in evidence and appointment of advocate commissioner by Court to take the affidavit on oath in chief examination and to record cross examination concerned; with reference to Sections 1 & 3 of Evidence Act, Order 18, Order 16, Order 19 & Order 26 CPC and Section 30 CPC and similarly other provisions including in Section 14 of the Family Courts Act and CrPC on the affidavit evidence and the AP Civil Rules of Practice and Circular Orders regarding affidavits and reception of evidence and the scope; Law of Evidence – Reception of affidavit in evidence and appointment of Advocate Commissioner by Court to take the affidavit on oath in chief examination and to record cross-examination:

(a) Section 1 of the Indian Evidence Act (for short 'Evidence Act' lays down that the Evidence Act applies to all Judicial Proceedings in or before any Court **but not to affidavits**

**presented to any Court or officer nor to proceedings before an arbitrator. So provisions of the Evidence Act does not apply to mere affidavits.**

(b) The definition of evidence as per Section 3 Evidence Act is an inclusive (though not an exhaustive) definition. It says that evidence means and includes.(1) All statements which the Court permits or requires to be made before it by witnesses, in relation to matters of fact under enquiry; such statements are called oral evidence. (2) All documents *including electronic records* produced for the inspection of the Court, such documents are called documentary evidence.

(c) The oral evidence (oral testimony of a person) as per Section 60 must be direct or original and not unoriginal or hearsay. The exceptions to this general rule are contained in Sections 6, 11 & 24 to 34 etc.

(d) Affidavit is normally understood as a written statement on oath. Section 3(3) of the General Clauses Act explains that Affidavit includes legally allowable affirmation and declaration instead of swearing. Thus, affidavit could be the oral testimony or statement on oath of a person.

(7) In this context it is essential to know the scope and co-relation between Or.18, Or.16 and Or.26 CPC:

(a). Order 18 Rule 4 CPC starts with its heading recording of evidence says that –

(i) In every case the *examination in chief of a witness shall be on affidavit* and copies thereof shall be supplied to the opposite party by the party who calls him for evidence and proof and

admissibility of documents filed if any with affidavit to rely shall be subject to the orders of the Court.

(ii) The evidence in cross examination and re-examination of the witness in attendance (whose evidence in chief examination furnished to the Court by affidavit), shall be taken either by the Court or by the Commissioner appointed by the Court and

(iii) recording of the evidence is either in writing or mechanically where such evidence recorded by commissioner he shall return it to the Court with his written report duly signed and the said Evidence shall form part of the record.

(iv) The Commissioner may record such remarks as he thinks material respecting demeanour of any of the witnesses while under his examination, and any objection raised during the recording of evidence before the Commissioner shall be recorded by him for the Court to decide at the stage of arguments.

(v) The Commissioner shall submit his report within 60 days from date of issue of the commission unless the Court for reasons to be recorded extends the time. The remuneration of Commissioner being fixed by the Court. In this regard for issue of Commission warrant, execution and return of the same the provisions of Order 26 Rules 16, 16A, 17 & 18 shall apply.

(vi). The Apex Court In 2004(1) SCC-702=(1)ALD-34(SC)-Ameer Trading Corp. vs. SDP Ltd while interpreting Order 18 R 4 and 5 for **recording of evidence** from the wording of Order-18 Rule-4-“***in every case***-the examination in chief of a witness shall be on affidavit” - held that it does not make any distinction between appealable and non-appealable cases so far as mode of

recording evidence is concerned. Such a difference is to be found only in Rules-5 & 13 of Order-18 CPC.

(vii). The literal meaning of the words “in every case” clearly indicates that “the chief examination of a witness shall be on affidavit”. This wording got its own importance to a reasonable conclusion that the affidavit by itself is not evidence in chief examination. It is only when the affidavit filed in Court is taken by Court as chief examination the statement of facts contained in the affidavit amounts to evidence in chief examination.

(viii). It is also because, though the heading of Order 18 Rule 4 CPC speaks about recording of evidence, out of the 8 sub rules to the Rule 4, neither in Order 18 Rule 4(1) nor in the proviso to it there is any mention or whisper of the word evidence since affidavit by itself is not evidence. The Order 18 Rule 4 Sub-rules (2), (3), (4-proviso) & (6) CPC have employed the word evidence. It got its own significance. It is from the close reading of Order 18 Rule 4 sub-rules 1 to 8 CPC; it becomes clear that the affidavit by itself is no evidence even it is filed in Court by party deponent or by any other deponents as witnesses to support the respective case of the parties. Once affidavit is filed, the Court has to receive.

(ix). Coming to the interpretation of the word **shall** in Order 18 Rule 4(1) the Apex Court in the Salem Advocates Bar Association Case -AIR 2003-SC-189 at paras 17 to 19 observed that from the reading of Order 18 and Order 16 together, it is evident that Order 18 Rule 4(1) applies to a case where a party to a suit without applying for summoning brings any witness to give evidence or produce any document, examination in chief of such

witness not to be recorded in Court but shall be in the form of an affidavit. Whereas a witness is summoned the Court can direct to file affidavit or can give option to the witness either to file affidavit or to be present in Court for his examination and the Court can even record evidence in part and direct Court commissioner to record in part.

(x) Even from the above, an affidavit-for chief examination filed as per Order 18 Rule 4 CPC, for no express bar though taken as part of Court record to read as evidence, it shall not have that sanctity, like a commissioner's report for the fact that commissioner is an officer of the Court and order 26 Rule 10 and R.8 r/w Or.26-A (by AP. Amendment) says report and evidence taken by Commissioner is to be read as evidence. Further it is not like arbitration proceedings to say that Evidence Act & CPC despite made not applicable specifically by Section 19(1) of the Act 1996, the Arbitration proceedings can contain recording of evidence for appreciation and to pass reasoned award. There infact Section 19(2) & (3) enables the parties to agree to the procedure to be followed or an Arbitrator can follow his own appropriate procedure to conduct proceedings. In Order 18 Rule 4 CPC there is no such provision.

(xi) Apart from it, the very Order 18 Rule 4 proviso CPC speaks about cross examination of the deponent based on his affidavit in chief examination and remarks about demeanor etc. which are the incidences of evidence covered by the Evidence Act provisions one way or other and as such application of Indian Evidence Act provisions are necessary in reality, that is also taken care of to some extent in Order 18 Rule 4(2) CPC.

(8). Whether Order 18 Rule 4 is applicable to appealable cases concerned:

(a).Regarding application of Order 18 Rule 4 (as to Order 18 Rule 4 prevails over Order 18 Rule 5), the Apex Court in **Ameer Trading Crop.** supra clearly held that the harmonious reading of Order 18 Rules 4 & 5 (*both the provisions are required to be given effect to and Rule-5 can not be read as exception to Rule-4*) would reveal that while in each and every case of recording of evidence the examination-in-chief is to be permitted in the form of Affidavit and while such evidence being taken on record, the procedure prescribed in Rule-5 to be followed in appealable cases. In non-appealable cases, the Affidavit can be taken on record by resort to the provisions of Order 18 Rule 13. In other words, mere production of affidavit by witness will empower the court to take such affidavit on record as forming part of the evidence by recording the memorandum in respect of production of such affidavit in all cases except in the appealable cases wherein it is necessary for the court to record evidence of production of Affidavit in respects of examination in chief by making the deponent to produce such affidavit as per Rule 5.

(b). Thus in all appealable cases though the examination in chief of a witness is permissible to be produced in the form of affidavit, such affidavit can not be ordered to form part of evidence unless the Deponent thereof enters the witness box and confirms that the contents of the affidavit are as per his say and the affidavit is under his signature and this statement being made on oath to be recorded by following the procedure prescribed under Rule 5.

(c). In fact in **Ameer Trading Crop**. Supra, Rule-19 of Order 18 CPC was not considered while reading Rules 5, 4 and 13. It appears from the reading of Order 18 Rules-1 to 19 that Order 18 Rule 4 is to be read with reference to Order 18 Rule 19, to understand the impact of Order 18 Rules 5 & 13. Order 18 Rule 5 says that in 'appealable cases, the evidence of each witness shall be (a) taken down in the Court language (i) in writing by or in the presence and under the personal direction and superintendence of the Judge or from dictation of Judge directly on a typewriter or to record mechanically in Court language on direction and in the presence of the Judge'. Thus in appealable cases evidence (which phrase includes as per Sections 135 to 139 & 141 Evidence Act, chief, cross and re-examination and leading questions subject to admissibility), to be recorded by the Court.

(d). Order 18 Rule 13 says in non-appealable cases the procedure in Rule 4 not necessary. Originally before (2002 Amendment) Order 18 Rule 4 also speaks about recording of evidence of a witness present in open Court. The above referred Order 18 Rules 4, 5 & 13 were previously amended by CPC 1976 Amendment.

(e). Order 18 Rule 4 (1) since amended commences with the words "in every case examination in chief of a witness shall be on affidavit. This indicates that the word every case reflects the purpose for which it is enacted unless something is occurring to interpret for its restricted application to non appealable cases. Further as per Order 18 Rule 19 Amended by 1999 CPC Amendment (Sec.27[iv]) w.e.f.01.7.2002 in force, notwithstanding

anything contained in these Rules 1 to 18 of Order 18 CPC, the Court may, instead of examining witnesses in open Court, direct their statements to be recorded on commission under Order 26 Rule 4A. Thus, the Order 18 Rule 5 virtually became shadow legislation to the above extent. (Since Order 18 Rule 19 enables recording of Evidence on commission by giving go-bye to the spirit of Order 18 Rule 5).

(f). Further, after the CPC Amendment Order 26 Rule 4A CPC reads that - notwithstanding anything contained in the Rules under Order 26, any Court may issue commission in any suit for examination, interrogation or otherwise of a person resident of the Courts jurisdiction and the evidence so recorded shall be read in evidence.

(g). Order 26 Rules 1 to 4 & 8 speaks of – cases in which Court may issue by order commission to examine witness and to read the deposition in evidence and Rules 3 & 5 cover the examination by commission of a witness within Courts jurisdiction and of a witness not within India. Order 26 Rules 15 to 18B & 21 are general rules as to expenses, powers of Court, questions objected to before Court etc.

(h) Now by virtue of Order 18 Rule 19 R/w. Rule 4 and Order 26 Rule 4A, the Order 18 Rule 5 has no overriding effect; otherwise Order 18 Rule 5 is shadowed by Order 18 Rule 19 R/w. Rule 4 & Order 26 Rule 4A, despite Order 18 Rule 4(1) not commencing with a non obstinate clause, such as not with standing any thing contained in Order 18 Rule 5. It is apt to refer the decision of **Dharangadhara Chemical Works Vs.**

**Dharangadhara Municipality**<sup>1</sup> that if there is a repugnancy between the two pieces of legislation dealing with the same subject matter, to such an extent that both cannot stand together and operate simultaneously, the later will have the effect of impliedly repealing the former. From this though it can be said that Order 18 Rule 4 procedure as per amended CPC is applicable even to appealable cases irrespective of what is contained in Order 18 Rule 5, in view of the judgment of the Apex Court in Ameer Trading Corp. supra, taking chief examination affidavit in appealable cases is by examination of the deponent at the witness box to confirm the contents of the affidavit that it is as per his say and that it bears his signature.

(i) No doubt this decision nowhere prohibits appointment of an Advocate commissioner (among the panel of Advocates constituted or otherwise as the case maybe) to record cross and re-examination and even in appealable cases as per Order 18 Rule 19 and Order 26 Rule 4A CPC including for taking as chief examination by examination of the deponent of the affidavit on oath by the commissioner to confirm the contents of the affidavit that it is as per his say and it bears his signature by following the procedure laid down in Order 18 Rule 5 and 19 r/w. Order 26 CPC.

(j) In fact a full bench of this Court in **Rita Pandit Vs. Atul Pandit**<sup>2</sup> observed in Paras 9 to 17, on the scope of Order 18 Rules 4 & 5 CPC in answering a reference that the expressions in **Ameer Trading Corporation**, dated 18.11.2003 by a two Judge Bench and Salem Bar Association-I, dated 25.10.2002 by a three

<sup>1</sup> 1985(4) SCC 92 =AIR-1985 SC-1729(A) Para 9

<sup>2</sup> 2005 (2) ALD 230 (FB)

Judge Bench referred saying in conflict in this regard of one to the other, in answering both the expressions are not in conflict since dealing with two different subjects and for any conflict from its reading the later judgment is per incuriam for the earlier to follow and by reconciling the two expressions it was held particularly at Para 17 that:

“17. An affidavit is merely an affidavit when it is filed in the Court. But when a witness appears for cross-examination, it is necessary for the witness either to confirm or differ the contents of the affidavit. After his confirmation or denial of the contents of affidavit, whatever recorded is the evidence and if the witness confirms to the affidavit, the affidavit would become part of the statement made by the deponent before the Court. **Therefore what is finally taken as evidence by the Court is not the affidavit, but what is contained in the affidavit, if confirmed by the deponent (sic. deponent) when he appears before the Court** for cross-examination. Going by the two judgments of the Supreme Court Salem Advocate Bar Association Tamilnadu v. Union of India, (supra) and Ameer Trading Corporation Ltd. v. Shapoorji Data Processing Ltd. (supra) we hold –

(1) that in all cases the examination-in-chief has to be conducted by way of affidavits;

(2) that in cases where the witness is not under the control of the party who wants to examine him as a witness, recourse can be taken to Order 16, Rule 1 of the Code of Civil Procedure and after taking recourse to Order 16, Rule 1 of CPC and after he is summoned by the Court, the witness can be asked either to file an affidavit or can be examined in the Court itself.

18. The reference is accordingly answered. The matter be placed before the appropriate Bench”.

(k). The appointment of an advocate commissioner to record evidence is not a trial in camera for anybody to place reliance on

the 9 Judge Bench expression of the Apex court in **Naresh Sridhar Meerajkar Vs. State of Maharashtra** where it mainly deals with publication of part of the court proceedings and trial shall be open unless regulated by a statutory provision for conducting in camera.

(l). The spirit of the CPC amendments are evident that since maximum time is consuming in recording oral evidence by the Courts which causes delay in disposal of cases, in order to reduce such delay, the amended provisions are brought in for reception of affidavits as evidence in chief examination and to permit chief, cross and re-examination to be recorded by Commissioner in all cases. The amended CPC thus empowers the Court or Commissioner appointed by a Court as officer of the Court, to take evidence in all cases in chief examination of any witness by affidavit (with equal enabling provision to the parties to file affidavits in lieu of chief examination) and right of cross-examination of such witness by an opposite party and also for re-examination and recording of any remarks including in respect of demeanor by such Commissioner of such witness during such examination.

(m). Whether evidence can be recorded by Video Conference concerned, the Apex Court in **State of Maharashtra vs. Dr.Praful B.Desai**<sup>3</sup> held that recording of evidence even in a criminal case by way of video conferencing is permissible. So long as the accused and/or his pleader is present when the evidence is recorded by the said way it is recording of evidence in the presence of the accused as per the requirements of Section 273

---

<sup>3</sup> 2003-CrLJ-2033= (4)SCC-601

CrPC as per the procedure established by law. The term presence does not mean actual physical presence as it includes even virtual presence in Court by video and audio linkage between both ends. Evidence since oral and documentary it can be produced by way of electronic records including video conference with in the definition of Section 3 Evidence Act. The Apex Court laid down certain guidelines and conditions to record the evidence through Video Conferencing. Similarly in a civil case **in Twentieth Century Fox Film Corp vs. NRI Firm Production Associates (P) Ltd.**<sup>4</sup> it was held that hearing suit and examination of witnesses and recording of evidence by commissioner contemplated by Order 18 Rule 4 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 is permissible complying the words in attendance. There are guidelines laid down therein for the precautions to be taken in recording such evidence.

(n). This court in **Sirangai Shoba @ Shoba Munnuri Vs.**

**Sirangi Muralidhar Rao**<sup>5</sup> held from Para 22 onwards that:

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

<sup>4</sup> 2003(3) ILD-505(Karnataka)

<sup>5</sup> CRP.No.337 of 2016, dated 19-10-2016

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 computers 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 , 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.

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. Greenbergs (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 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 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-I - 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-II - 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 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. - 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 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 difference 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 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 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- 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 the Culcutta 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 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* 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.

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 Bankers 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 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 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 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 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*, 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 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, 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--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 (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 wont 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.”

(o). No doubt, language, like other things human, is imperfect and how great so ever be the precision with which it is chosen, however superior be the skill of the draftsman, the language of every code needs to be supplemented by the knowledge just described, and the mind of the reader to be trained by this study thereof. This statutory interpretation has no conventional protocol. The object, intention and purpose of a legislation assumes greater relevance if the language is obscure and ambiguous as held in **Shri Sarwan Singh vs. Shri Kasturi**<sup>6</sup>. In **Shyam Kishori Devi Vs. the Patna Municipal Corporation**<sup>7</sup>- it was held that the well known rule of construction is to make the section or law workable (i.e. Purposive interpretation). The general rule of construction is not only to look at the words but also to look at the context, the connection and the object of such words relating to such matter and interpret the meaning according to what would appear to be the meaning that is

<sup>6</sup> 1977(1) SCC-750=AIR-1977-SC-265 at 274

<sup>7</sup> AIR-1966-SC-1678=1966(3)SCR 466

intended to be conveyed by use of the words under the circumstances as held in **Jagat Singh Vs. State of Bihar**<sup>8</sup>.

(p) Therefore even Section 1 Evidence Act excludes application of evidence Act to affidavits when once statement of facts in the affidavit of a deponent taken by Court as evidence in chief-examination as per Order 18 Rule 4 CPC, the bar of Section 1 Evidence Act is no way coming in the way and thereafter there is no any provision in the Evidence Act from Sections 3 to 167 either prohibiting or inconsistent with the concept contained in Orders 18, 16 & 26 CPC. Thus the Court is empowered to apply the provisions contained in Sections 3 to 167 Evidence Act to the affidavit evidence covered by Orders 18, 16 & 26 CPC.

9. Now from this point in view, coming to Sec.1 Evidence Act and Order 18 Rules 4,5,13 &19 CPC:

(a). Though Sec.1 Evidence Act says application of Evidence Act doesn't extend to affidavits, (i) whether for affidavit filed in Court once the Court taken – the affidavit as chief examination while implementation of Order 18 Rule 4 CPC, the character of affidavit therefrom changes to the character of chief examination evidence of the contents including from the expression of the Full Bench of this Court in **Rita Pandit Supra** and therefrom the bar under Sec.1 Evidence Act ceases from that movement and to the chief examination evidence the provisions of Evidence Act Sections 3 to 167 apply; leave about Sec.1 Evidence Act requires amendment at least by adding an explanation to Sec.1 Evidence Act to the effect that an evidence affidavit once taken as chief

---

<sup>8</sup> 1976(2) SCC = AIR 1976 SC 997

examination, the character of affidavit ceases and assumes the character of chief examination evidence.

(b). From the reading of Sec.1 Evidence Act and Or.18 R.4 CPC, there is no wording in Or.18 R.4(1) CPC to say that mere filing of affidavit styling as chief examination by affidavit itself is evidence. It is not even stated as affidavit is part of Court record to read. The provisions further speak about cross examination and re-examination after a deponent's affidavit became his chief examination. It is to mean affidavit can be taken as chief examination evidence by Court and it is therefrom to that chief examination the provisions of the law of evidence guided by the Evidence Act automatically apply.

(c). As such, before taking the affidavit as chief examination, from the notice to opposite party requires to be given in advance, any objections to the contents of the affidavit on relevancy and admissibility, including within the scope of pleadings or traveled beyond the pleadings, the court has to decide such objection and take on oath as chief examination only within the scope of pleadings and take such extent relevant and admissible in evidence; for such affidavit once taken on oath forms part of evidence as chief examination and under Section 136 Evidence Act the party leads evidence for its admitting as evidence has to satisfy on admissibility and relevancy; so that irrelevant portion of affidavit can be eschewed from record before taking the affidavit as chief examination evidence; for once taken as evidence in chief of the affidavit or any portion of it, eschewing any portion from the evidence in chief of the affidavit taken on oath on record does not arise, but for ignoring from consideration

in ultimate appreciation from any inadmissibility and irrelevancy of any portion of evidence.

(d). Needless to say there can be only one affidavit in chief examination of each witness in the case and allowing of number of affidavits in chief examination of one in continuation to the other will not arise for it defeats the very object of introducing the provision of taking affidavit as chief examination and also for the wording of affidavit and not affidavits, apart from the fact that after taking the affidavit on oath as chief examination and marking of documents by the Court or by the Court Commissioner subject to order and approval of court so far as the documents marking concerned, either of them can record any further chief examination of the witness and the same also lends support from the Apex Court's expression in the Salem Advocates Bar Association Case-1 supra of the Court can direct to file affidavit or can give option to the witness summoned either to file affidavit or to be present in Court for his examination and the Court can even record evidence in part and direct Court commissioner to record in part.

10. Study of similar provisions in CPC, CrPC, respective Rules of practice and other provisions, with reference to decided cases:

(a). In **Smt. Sudha Devi Vs. M.P. Narayanan<sup>9</sup>; M/s. Shamsunder Rajkumar firm Vs. M/s. Bharat Oil Mills, Nagpur<sup>10</sup>; State of Rajasthan Vs. M/s. Sindhi Film Exchange<sup>11</sup>; Ali Bin**

<sup>9</sup> 1988(3) SCC 366=AIR-1988-SC-1381

<sup>10</sup> AIR-1964-Bombay 38

<sup>11</sup> AIR-1974-Rajasthan 31

**Aifan Vs. State**<sup>12</sup>, **Nadella Estates Pvt. Ltd. Hyderabad v. Prema Ravindranath**<sup>13</sup> - it was held that affidavits are not included in the definition of Evidence u/s. 3 Evidence Act. Affidavits can no doubt be used as evidence only if for sufficient reason Court passes an order from the above expressions. From **Gampa Sai Ravi Kiran vs. Bonda Rama Lakshmi**<sup>14</sup>, **Nadella Estates supra**, **Ali Bin Aifan supra**, cross examination of a deponent is not as a matter of right in interlocutory applications. In **Shetty Chandra Shekar v. Neeti Ramulu**<sup>15</sup> it was held that such right is available in case of third party deponent and not for party deponent. In **Pathange Mohan Krishna Rao vs. Smt Navale Sreevani**<sup>16</sup> it was held some of the above expressions did not refer definition of evidence speaks of witness in Section 3 Evidence Act and thereby *per incuriam*. In fact Section 3 Evidence Act defines "evidence" of which oral evidence is to mean and include all statements which the Court permits or requires to be made before it by witnesses, in relation to matters of fact under inquiry. The word witness arises during trial for giving evidence and not in interlocutory applications and the affidavit of deponent used in Order 19 CPC speaks for interlocutory as well as during trial by drawing distinction between Rule 1 to Rule 2 of the Order 19 and what is held in Nadella supra is that there is no such distinction between party deponent and third party deponent to draw any distinction between the two in **Shetty Chandra Shekar supra**.

---

<sup>12</sup> AIR-1983-AP-14=1983(1)ALT-39

<sup>13</sup> 2015 (4) ALT 665

<sup>14</sup> 2013(2) ALT 784

<sup>15</sup> 2008 (2) ALT 463

<sup>16</sup> C.R.P.No.2046 of 2016, dt.03-06-2016

(b). In fact in **Nadella Estates supra**, mainly relying upon the well considered earlier expression of this court in **Gaddipati Sambraiyam Vs Panguluri Mahalakshamma**<sup>17</sup> which followed the expression of the Karnataka High Court in **B.R.Vishwanath Singh Vs. Shivalingaiah**<sup>18</sup> and of this Court in **Sakalabhaktula Vykunta Rao Vs. Made Appala Swamy**<sup>19</sup> very clearly laid down the distinction between Order 19 Rule 1 & 2, that the reading of the judgments with reference to Order 19 Rules 1 to 3 clearly indicates that an affidavit by itself is no evidence since it is not included in Section 3 Evidence Act and specifically excluded by Section 1 Evidence Act. Thus it may not be correct in **Pathange supra** to say **Nadella supra** did not consider Section 3 Evidence Act.

(c) In **M/s. Parekh Bros. Vs. Kartick C.S.**<sup>20</sup> relying on **Kamakshya P. Dalal Vs. Emperor**<sup>21</sup>; **Marneedi Satayam Vs. Masimukkula Venkataswami**<sup>22</sup>; **Dominion of India Vs. Rupchand**<sup>23</sup> and **M/s. Sham sunder Rajkumar firm supra**—it was held that an affidavit *per-se* does not become evidence in the suits but it can become evidence only by consent of the parties or where it is specifically authorized by a particular provision of law (through a particular procedure). Once such is the case by virtue of Order 18 CPC and Section 3 Evidence Act, affidavit filed in a suit by a deponent (either party or third party with no distinction

---

<sup>17</sup> 1995 (1) ALT 305

<sup>18</sup> AIR-1982-Karnataka-81

<sup>19</sup> AIR-1978-AP-103

<sup>20</sup> 1968 AIR Calcutta 532 at 537

<sup>21</sup> AIR 1939 Cal. 657

<sup>22</sup> AIR 1949 Mad.689 at 690

<sup>23</sup> AIR 1953- Nag.-169

can be taken) as chief examination of said deponent-witness on oath as also observed in Salem Bar Association case-1 supra.

(d). In **Munir Ahmad and others Vs. State of Rajasthan**<sup>24</sup> it was held in a Criminal Case on admissibility of affidavit of defence-witness that Section 3 Evidence Act contemplates oral and documentary evidence. In case of living persons, evidence in judicial proceedings must be tendered by calling the witness to witness box and cannot be substituted by affidavit, (i) unless law permits it or (ii) the Court by order expressly allows it. (The apex Court recognized here power of the Court to take an affidavit of a deponent as evidence of said witness in the suit in question).

11. From the above now specifically to consider scope of Order 19 Rules 1 to 3 & the AP Civil Rules of Practice and Circular orders -Chapter-IV:

(a). In **Gaddipati Sambraajyam supra** referring to Order 19 Rules 1 to 3 CPC it was held that it clearly indicates that an affidavit by itself is no evidence since it is not included in Section 3 Evidence Act and specifically excluded by Section 1 Evidence Act, but, the Courts may permit proof of any fact or facts by means of affidavit evidence under Order 19 Rule 1&2.

(b). The proof used in Order 19 Rule 1 is in the sense to mean final proof and not prima-facie proof. Whenever any fact or facts permitted by Court to be proved by means of an affidavit of a witness of a party, if the opposite party desires presence of deponent to cross examine, the Court should not accept the affidavit as evidence under Order 19 Rule 1 CPC as per its proviso as laid down in **Nadella** and **Gaddipati Sambraajyam supra**.

---

<sup>24</sup> 1989 Supp(1) SCC 377=AIR-1989-SC-705 at 710 Para -11

(c). As per Order 19 Rule 2 for proof *prima-facie* (and not final proof on merits) upon application of party to give evidence by affidavit filed in Court, when the Court not using the affidavit as evidence, the party may produce the deponent for cross examination by opposite party or the Court can, call the deponent's presence for cross examination by opposite party at the instance of either party.

(d). If we read in this contest the Order 19 Rule 3 for the above distinction between Order 19 Rule 1 and Order 19 Rule 2, it makes the scope further clear, since as per Order 19 Rule 3, the scope of facts that can be confined in the affidavit of a deponent are for final proof, such facts to state which the deponent is able to prove from his personal knowledge and for prima-facie proof in interlocutory applications the statements of the deponent's belief are also admissible provided the grounds thereof are stated.

(e). In the AP Civil Rules of Practice and Circular Orders, the Rules 34 to 52 (Chapter IV) deal with affidavits for use in judicial proceedings to read in support of an application so also counter affidavits in reply to affidavit contents and the Court got the power to direct the deponents for cross examination. Here also it did not lay any distinction between party deponent and third party deponent.

(f). In **Gian Chand vs. Tirath Ram Gupta**<sup>25</sup> it was held by the Punjab High Court that the ordinary rule is that, a decision on facts of a case must be decided on evidence recorded viva-voce in Court as provided by Order 18 CPC. This procedure can be

---

<sup>25</sup> AIR-1973-Punjab-210

dispensed with where either party agree or any law permits or the Court makes an order to decide the case on affidavits evidence with opportunity to opposite parties for cross examination. In this contest please read **K V Subba Rao vs. The State**<sup>26</sup>.

(g). From this legal position, the areas law permits evidence by affidavit for proof which may either for final proof or prima facie proof as the case may be are (i). Section 295 CrPC permits evidence by affidavit in proof of conduct of a public servant; (ii). Section 296 CrPC (old Sec.510A) permits evidence of formal character by affidavit-See also the Apex Court's expression in this regard in **Nirmaljit Singh vs. State of WB**<sup>27</sup>.

(h). Further, Section 16 of the Family Courts Act permits evidence of formal character to prove by affidavit.

(i). Section 30(c) CPC says Court may order any fact to be proved by affidavit. This provision infact applies to affidavit reception in interlocutory applications for deciding on merits visvis in suits or other original applications during trial from its reading with Order 19 Rules 1 to 3 CPC.

(j). Order 19 Rules 1 to 3 CPC as detailed above say that any Court may at any time order that a particular fact or facts may be proved by affidavit or that the affidavit of any witness may be read at the hearing on such condition as the Court thinks reasonable,

(k). Sections 32 & 33 Evidence Act also speak on admissibility with evidentiary value as relevant even statement of a living person under certain contingencies viz., who cannot be found, who has become incapable of giving evidence or whose

<sup>26</sup> AIR-1967-AP-202 at Para-D

<sup>27</sup> AIR-1972-SC-2639

evidence cannot be procured without an amount of unreasonable delay or expense.

(l). In **Kalyan-Peoples'Co-op.Bank Vs. Dulhan Bibi A A Patil**<sup>28</sup>-it was held that deposition of a person in a previous proceeding is admissible in evidence in a subsequent judicial proceeding by consent of the parties. Infact like any previous statement it can be used for contradiction or to impeach the credit of the witness as per Sections 145 and 155(3) Evidence Act, if not for corroboration as per Section 157 Evidence Act.

(m). **M/s. Mangilal Rungta vs. Manganese Ore (India) Ltd**<sup>29</sup>- it was held that proof of facts of whole suit, irrespective of nature of the suit, by affidavit under Order 19 Rule 1 & 2 CPC, is permissible and can not be said as impermissible and holding otherwise would be too unrealistic and too technical a view, of the law of procedure resulting in to great waste of public time and money and would through unnecessary burden on our already over burdened legal machinery.

12. The above provisions and propositions to a considerable extent are exceptions to the general rule in Section 1 Evidence Act that Evidence Act does not extend to affidavits. These provisions require order of the Court permitting (i) any party to prove any facts by affidavit. Unless such an order is passed to take the affidavit contents as evidence, (subject to cross examination if any), any affidavit contents by itself is not evidence in chief examination in suits and original petitions, but for to consider proof of any facts in interlocutory applications. In **C.S.**

<sup>28</sup> AIR-1966-SC-1072=1963(2)SCR-348

<sup>29</sup> AIR 1987 Bombay 87(B)

**Rowjee vs. State of Andhra Pradesh**<sup>30</sup> it was held by the Apex Court that facts in the affidavit uncontroverted by opposite party can be deemed as admitted to rely.

13. Thus affidavit by itself not covered by Evidence Act applicability to treat the statements there in as evidence even from the combined reading of Sections 1& 3 Evidence Act, however once the Court accepts and takes it, it is evidence in chief examination subject to opportunity for cross examination of the deponent by the opposite party having such right if desires in the suits and original petitions, but for to permit or not permit for cross examination to consider proof of any facts stated by the deponent in an interlocutory application. When such is the case, to the evidence affidavit taken as chief examination of party or witness by way of oral evidence defined in Section 3 Evidence Act, all the provisions of the Evidence Act from Sections 3 to 167 and incidence of evidence are applicable including the provisions of Chapter X covered by Sections 135 to 166 Evidence Act for appreciation of evidence as to admissibility, competency & credibility of a witness with reference to relevancy including from other provisions particularly from Sections 5 to 60 Evidence Act, of whose affidavit is accepted and taken as Chief examination by Court permitting for cross examination, since no statement of a witness can be affective and substantive evidence to be used in appreciation of evidence under Section 3 Evidence Act unless and until opportunity to opposite party to sublimate and refine it by test of cross examination if the opposite party desires as per Section 138 Evidence Act.

---

<sup>30</sup> AIR 1964 SC-962=1964(6) SCR 330

14. The recording of evidence as per Evidence Act, more particularly from Section 137, during trial consists of a) Chief examination of a witness by the party who called {either being taken by affidavit or being recorded by Court directly or through Court Commissioner as per Order 18 Rules 4,5 & 19 r/w. Order 26 Rules 4 & 4A CPC and Sections 135,137&138 Evidence Act}, b) Cross-examination by the opposite party {being recorded by Court directly or through Court Commissioner as per Order 18 Rules 4,5 & 19 Order 26 Rules 4 & 4A CPC and Section 135,137-139 Evidence Act}, which is the safeguard for testing the value of the human statements in chief examination of a witness, more particularly under Section 136 Evidence Act, and (c) re-examination to clarify and explain any ambiguity in evidence or to bring a new matter with permission of Court subject to right of opposite party to further cross-examine that witness, under Section 138 Evidence Act.

15. It is from this concept in mind if we read Order 18 CPC which deals with the subject of, hearing of the suits and examination of witnesses, the order 18 Rules 4,13&19 Amended CPC are no way inconsistent to the provisions of Sections 1 or 3-167 of Evidence Act.

16. Needless to say from the above that, without guidance from the provisions of Sections 3 to 167 of the Evidence Act—regarding (a) admissibility (b) relevancy, (c) probability (d) competency and (e) credibility of a witness and proof and probative value of a document including on its relevancy, admissibility etc., it is difficult to appreciate the evidence on record brought in chief examination by affidavit taken on oath

and or recorded further by court or court commissioner including recording of cross examination and re examination and marking of documents also if any of subject to objection as to proof, relevancy and admissibility, other than as to stamp duty and registration; leave about any marking of document as secondary evidence if no objection raised as to primary evidence on procedural aspect of deemed waived and is as good as original as held in **RVEV.Gounder vs.AVVP.Temple**<sup>31</sup> which was later relied in **Dayamathi bai vs K.M Shaffi**<sup>32</sup>.

17. The next aspect that arises to resolve the practical difficulty is on the contents of the affidavit of a witness filed for taking it by Court as chief examination if contains irrelevant and inadmissible portions and if objected by otherside, how to deal with concerned:

(a). If an affidavit contents contain some irrelevant and inadmissible facts, is the Court bound to take the entire contents of the affidavit, which includes those irrelevant and inadmissible portions and pass order taking the same as chief examination evidence? Regarding documentary evidence the conflict and controversy is resolved by the Apex Court saying to left open while marking any objection for consideration at the final decision. Now coming to the admitting of oral evidence from contents of the affidavit, the legal position is clear that an affidavit by itself is not evidence unless taken as such by the Courts.

(b) The AP Civil Rules of Practice in Rule 50 says that the Court may *suo-mottu* or on application order to be struck out

---

<sup>31</sup> AIR 2003 SC 1971

<sup>32</sup> AIR 2004 SC 4082

from any affidavit any matter which is scandalous etc., Further the Evidence Act and CPC nowhere contemplate that evidence which is inadmissible, irrelevant, unconnected or unnecessary for the point or question at issue has still to be admitted by Courts.

(c) Thus, while taking by Court contents of a statement of fact or facts etc., in the form of an affidavit of a deponent as a witness by chief examination, u/s 136 Evidence Act, the Court can decide relevancy and admissibility to receive as chief examination. In this regard in **Nanak Chand Vs. Mian Mohammad Shahabaz Khan**<sup>33</sup> following **Miller Vs. Babu Madho Das**<sup>34</sup> it was held that it is the duty of the Court to exclude all irrelevant or inadmissible facts in receiving evidence. Further in **Ramdeo vs. State of Rajasthan**<sup>35</sup>-it was held that a judge should not be haunted by the idea that there was no ruling or precedent to guide him in estimating from the material produced before him, the evidence to admit from relevancy for appreciation. The Court can even under section 151 CPC eschew or exclude or expunge or strike out or shun the unworthy, irrelevant or inadmissible portion if any in the contents of the statement in the form of affidavit of a deponent and take into consideration the rest of the contents of the statement in the affidavit to admit as chief examination of said person as witness, since the affidavit by itself is not evidence, unless taken as such by Court and for that it requires no more authority. In fact in **R.N.Saxena vs. Bhimsen**<sup>36</sup> it was held, following the earlier full bench judgment

---

<sup>33</sup> AIR 1936-Lahore 114

<sup>34</sup> 23 (Indian Appeals) page 106 (privy council) year-1896

<sup>35</sup> 1964 R.L.W. page 264

<sup>36</sup> AIR 1966 Allahabad page 84 (F.B.) at page 87

in **Nursing Das case**<sup>37</sup>, that Courts are not to act upon the principle that every procedure is to be taken as prohibited unless it is expressly provided for by the Code, but on the converse principle that every procedure is to be understood as permissible till it is shown to be prohibited by any law. It was further held following the privy council judgment in **Shamu-Patter vs. Abdul Kadir**<sup>38</sup> that “every Court trying civil causes has inherent jurisdiction to take cognizance of questions which cut at the root of the subject matter of controversy between the parties” even in the absence of any provision in the Code, for procedural law is handmaid of justice. The above power of Court under section 151 CPC to eschew or exclude or expunge or strike out or shun the unworthy, irrelevant or inadmissible portion if any in the contents of the affidavit is without prejudice to the rights and contest of any party on admissibility and relevancy etc., in appreciation of entire evidence on record ultimately, to ignore or leave out from consideration, any inadmissible, irrelevant, untrue or unreliable evidence from the affidavit contents taken as chief examination, while deciding any facts in issue are proved or not proved or disproved as the case maybe for giving any findings thereon from merits as the inherent power has its roots in necessity and its breadth and length is too exhaustive with the necessity as held by the Apex Court in **Newabganj Sugar Mills Co.Ltd vs. The Union of India**<sup>39</sup>.

(d). Needless to say, if the courts resort to the eschewing of any portion of a statement of facts from the contents of an

---

<sup>37</sup> ILR 5 Allahabad page 163

<sup>38</sup> 39 Indian appeals page 218

<sup>39</sup> 1976(1) SCC 120 = AIR 1976 SC 1152

affidavit while taking as evidence in chief examination by elaborate hearing before taking said affidavit contents as evidence and to pass orders with reasons for so doing in each of affidavit of deponents filed in Court it consumes huge time of court which is sacrosanct, no doubt the Court in receiving the evidence has to apply its mind thereby, to strike a balance and unless it is beyond pleadings and irrelevant or inadmissible *per-se*, it is better to mark the portions subject to objection for receiving in evidence from the contents of affidavit to decide ultimately during final decision, which saves the time of Court and prevents the possibilities of the parties agitating against any observations giving finality, either by attacking in revision or the like which stalls there from the proceedings in trial courts leading to procrastination of the litigation by giving length of life to the litigation as held in **Bipin Santhi lal Panchal Vs State of Gujarat**<sup>40</sup>, which was later relied in **State vs. Navajyoti Sanddhu**<sup>41</sup>, that but for objection as to stamp duty and penalty to decide instantaneously before marking document/instrument all other objections for marking documents even can be subject to objection. So far as want of registration concerned, an unregistered document can even be marked where there is a collateral purpose. In so far as stamp duty concerned, collateral purpose is unknown. Thus the procedure for marking a document requires stamp duty and registration is vividly laid down by the Apex Court in **SMS Tea Estates Pvt. Ltd. Vs. Chandmari Tea Company Pvt. Ltd.**<sup>42</sup> as follows:

---

<sup>40</sup> AIR 2001 SC 1158

<sup>41</sup> 2003(6) SCC -641

<sup>42</sup> 2011 (5) ALD 149 (SC)

“(i) The court should, before admitting any document into evidence or acting upon such document, examine whether the instrument/document is duly stamped and whether it is an instrument which is compulsorily registerable.

(ii) If the document is found to be not duly stamped, Section 35 of Stamp Act bars the said document being acted upon. The court should then proceed to impound the document under Section 33 of the Stamp Act and follow the procedure under Section 35 and 38 of the Stamp Act.

(iii) If the document is found to be duly stamped, or if the deficit stamp duty and penalty is paid, either before the Court or before the Collector (as contemplated in Section 35 or 40 of the Stamp Act) and the defect with reference to deficit stamp is cured, the court may treat the document as duly stamped.

(iv) Once the document is found to be duly stamped, the court shall proceed to consider whether the document is compulsorily registerable. If the document is found to be not compulsorily registerable, the court can act upon the document, without any impediment.”

18. The next aspect that arises to consider from the rival claims is on the powers and limitations of the Courts to appoint advocate commissioner to record evidence of witnesses, either party witnesses or third party witnesses as the case may be and in what type of cases:

19. The Apex Court in **Salem Advocates Bar Association, Tamilnadu Vs. Union of India**<sup>43</sup> (for short Salem Bar Association case-II) regarding the advocate commissioners appointment by Court to record evidence of witnesses and fees payable by the parties observed referring to the 3 reports of Justice Jagannadha Rao Committee appointed by the Apex court from the judgment in Salem Bar Association case-I that:

---

<sup>43</sup> 2005 (6) SCC 344

“.....Amendment of Order XVIII Rule 4 provides that in every case, the examination-in- chief of a witness shall be on affidavit. The Court has already been vested with power to permit affidavits to be filed as evidence as provided in Order XIX Rules 1 and 2 of the Code. It has to be kept in view that the right of cross-examination and re-examination in open court has not been disturbed by Order XVIII Rule 4 inserted by amendment. It is true that after the amendment cross-examination can be before a Commissioner but we feel that no exception can be taken in regard to the power of the legislature to amend the Code and provide for the examination-in-chief to be on affidavit or cross-examination before a Commissioner. The scope of Order XVIII Rule 4 has been examined and its validity upheld in Salem Advocates Bar Association's case. There is also no question of inadmissible documents being read into evidence merely on account of such documents being given exhibit numbers in the affidavit filed by way of examination-in-chief. Further, in Salem Advocates Bar Association's case, it has been held that the trial court in appropriate cases can permit the examination-in-chief to be recorded in the Court. Proviso to sub-rule (2) of Rule 4 of Order XVIII clearly suggests that the court has to apply its mind to the facts of the case, nature of allegations, nature of evidence and importance of the particular witness for determining whether the witness shall be examined in court or by the Commissioner appointed by it. The power under Order XVIII Rule 4(2) is required to be exercised with great circumspection having regard to the facts and circumstances of the case. It is not necessary to lay down hard and fast rules controlling the discretion of the court to appoint Commissioner to record cross-examination and re-examination of witnesses. The purpose would be served by noticing some illustrative cases which would serve as broad and general guidelines for the exercise of discretion. For instance, a case may involve complex question of title, complex question in partition or suits relating to partnership business or suits involving serious allegations of fraud, forgery, serious disputes as to the execution of the will etc. In such cases, as far as possible, the court may prefer to itself record the cross-examination of the material witnesses. Another contention raised is that when evidence is recorded by the Commissioner, the Court would be deprived of the benefit of watching the demeanour of witness. That may be so but, In our view, the will of the legislature, which has by amending the Code provided for recording evidence by the Commissioner for saving Court's time taken for the said purpose, cannot be defeated merely on the ground that the Court would be deprived of watching the demeanour of the witnesses. Further, as noticed above, in some cases, which are complex in nature, the prayer for recording evidence by the Commissioner may be declined by the Court. It may also be noted that Order XVIII Rule 4, specifically provides that the Commissioner may record such remarks as it thinks material in respect of the

demeanour of any witness while under examination. The Court would have the benefit of the observations if made by the Commissioner. The report notices that in some States, advocates are being required to pass a test conducted by the High Court in the subjects of Civil Procedure Code and Evidence Act for the purpose of empanelling them on the panels of Commissioners. It is a good practice. We would, however, leave it to the High Courts to examine this aspect and decide to adopt or not such a procedure. Regarding the apprehension that the payment of fee to the Commissioner will add to the burden of the litigant, we feel that generally the expenses incurred towards the fee payable to the Commissioner is likely to be less than expenditure incurred for attending the Courts on various dates for recording evidence besides the harassment and inconvenience to attend the Court again and again for the same purpose and, therefore, in reality in most of the cases, there could be no additional burden.

Amendment to Order XVIII Rule 5(a) and (b) was made in 1976 whereby it was provided that in all appealable cases evidence shall be recorded by the Court. Order XVIII Rule 4 was amended by Amendment Act of 1999 and again by Amendment Act of 2002. Order XVIII Rule 4(3) enables the commissioners to record evidence in all type of cases including appealable cases. The contention urged is that there is conflict between these provisions.

To examine the contention, it is also necessary to keep in view Order XVIII Rule 19 which was inserted by Amendment Act of 1999. It reads as under:

"Power to get statements recorded on commission. Notwithstanding anything contained in these rules, the Court may, instead of examining witnesses in open Court, direct their statements to be recorded on commission under rule 4A of the Order XXVI."

The aforesaid provision contains a non-obstante clause. It overrides Order XVIII Rule 5 which provides the court to record evidence in all appealable cases. The Court is, therefore, empowered to appoint a Commissioner for recording of evidence in appealable cases as well. Further, Order XXVI Rule 4-A inserted by Amendment Act of 1999 provides that notwithstanding anything contained in the Rules, any court may in the interest of justice or for the expeditious disposal of the case or for any other reason, issue Commission in any suit for the examination of any person resident within the local limits of the court's jurisdiction. Order XVIII Rule 19 and Order XXVI Rule 4-A, in our view, would override Order XVIII Rule 5(a) and (b). There is, thus, no conflict. The next question that has been raised is about the power of the Commissioner to declare a witness hostile. Order XVIII Rule 4(4) requires that any objection raised during the recording of evidence before the Commissioner shall be recorded by him and decided by the Court at the stage of arguments. Order XVIII Rule 4(8) stipulates that the provisions of Rules 16, 16-A, 17 and 18 of Order XXVI, in so far as they are applicable, shall apply to the issue, execution and return

of such commission thereunder. The discretion to declare a witness hostile has not been conferred on the Commissioner. Under Section 154 of the Evidence Act, it is the Court which has to grant permission, in its discretion, to a person who calls a witness, to put any question to that witness which might be put in cross-examination by the adverse party. The powers delegated to the Commissioner under Order XXVI Rules 16, 16-A, 17 and 18 do not include the discretion that is vested in Court under Section 154 of the Evidence Act to declare a witness hostile.

If a situation as to declaring a witness hostile arises before Commission recording evidence, the concerned party shall have to obtain permission from the Court under Section 154 of the Evidence Act and it is only after grant of such permission that the Commissioner can allow a party to cross-examine his own witness. Having regard to the facts of the case, the Court may either grant such permission or even consider to withdraw the commission so as to itself record remaining evidence or impose heavy costs if it finds that permission was sought to delay the progress of the suit or harass the opposite party. Another aspect is about proper care to be taken by the Commission of the original documents. Undoubtedly, the Commission has to take proper care of the original documents handed over to him either by Court or filed before him during recording of evidence. In this regard, the High Courts may frame necessary rules, regulations or issue practice directions so as to ensure safe and proper custody of the documents when the same are before the Commissioner. It is the duty and obligation of the Commissioners to keep the documents in safe custody and also not to give access of the record to one party in absence of the opposite party or his counsel. The Commissioners can be required to redeposit the documents with the Court in case long adjournments are granted and for taking back the documents before the adjourned date.

20. Thus this judgment left no stone unturned in answering the recording of evidence before the Commissioner of filing of a chief affidavit or even to direct to record evidence in chief and cross by commissioner and it makes no difference including in appealable cases and the fees is to borne by the parties as directed by the Court and also taken care of demeanour observation, marking of documents, permitting cross examination of own witness etc., and in what case Court exercise the

discretion to appoint commissioner suo-mottu and in what case to record the evidence by Court itself.

21. In **D. Chandrakala Vs. SMS Sangam**<sup>44</sup>, this Court observed that in complex cases like suit for declaration of title based on will where execution of will in dispute and cases where expert gave opinion on disputed signatures etc., Court can record evidence declining request to appoint commissioner; however, commissioner's appointment to record evidence of scribe or attestors or expert witness can be considered, leave about no impediment to the Court to summon a witness sought to be examined on commission.

22. In **T.Srinivasa Rao Vs. T.V. Rangaiah**<sup>45</sup>, this Court observed that examination of witness by commission is not as a matter of course and recourse would depend upon the pressure of work in the Court and condition of witness since each and every step in the adjudicatory process has its own impact on the ultimate outcome and credibility of entire system.

23. In **Qamar Begum Vs. Habeebunnisa**<sup>46</sup>, this Court observed that appointment of a commissioner to record evidence of a witness is not as a matter of course as held in Srinivasa Rao supra for Courts participation in recording evidence is necessary in complicated cases.

24. In **Vemunandana Ramakrishnam Raju Vs. Darla Srinivas**<sup>47</sup>, this Court observed that the casual appointment of a commissioner to record evidence without assigning reasons is not proper.

---

<sup>44</sup> 2007 (1) ALT 230

<sup>45</sup> 2006 (5) ALD 823

<sup>46</sup> 2007 (1) ALD 515

<sup>47</sup> 2016 (3) ALD 516

25. From the above, as there is no hard and fast rule of in which case commissioner to be appointed and in which it is not, by the Court of its own without even application, but for what are the illustrative matters referred by the Apex Court in Salem Bar Association case II in 2005, it is in complicated factual matters involved Court generally record evidence at least of main witnesses and appoint advocate commissioner to record evidence of other witnesses more particularly from pressure of work and work load with huge pendency in almost all courts and therefrom coming to the facts, merely because the defendants dispute the suit sale agreement as forged and fabricated one and did not execute and did not enter sale agreement, by itself it cannot be said the suit involves complicated questions of fact for only to record by Court the evidence even after the party witness PW.1 in cross examination. Thus the appointment of a commissioner by Court of its own by virtue of the enabling provision under Order XVIII Rule 19 r/w Rules 4 & 5 and Order XXVI Rules 4 & 4A CPC cannot be find fault including from the guidelines in the expression of Salem Bar Association case II. Thus, the revision deserves dismissal for the impugned order no way requires interference.

26. For sake of convenience to adopt to the extent possible a model of Commission warrant is enclosed herewith.

**“IN THE COURT OF -----**

**Present: Sri -----.**

**Dated, this the --- day of ---, 2018**

**OS/AS/OP/OA---/2018**

Between:

.. Petitioners/applicants/Plaintiffs

Vs.

.... Respondents/Opposite Partners/Defendants

To  
Sri

ADVOCATE-COMMISSIONER,

1. Whereas this Court appointed you as Commissioner to record the evidence of the parties and witnesses i.e., PW1 and other witnesses and to take affidavit in chief on oath and record cross examination evidence of other witnesses of both sides on such dates being fixed by you i.e., the Commissioner and to file reports of progress on the respective dates of the adjournments of the matter by the Court.

2. You have to follow the procedure laid down under Sec.75 (a) Order 26 Rule 4(A) Rules 1 to 8 and 15 to 18 r/w Order 18 Rules 1 to 19 C.P.C., Rule 113 of CRP and provisions of the Evidence Act.

3. You are directed to record the evidence at your hand or typed to dictation and also simultaneously (as per Or.18 R.4(3) & (as per Para 12 of the SABA case I-reported in 2002 (6) ALD – 34 (SC) by tape recording/ Audio recording, so as to obviate any controversies between parties while recording evidence or later.

4. Your fees is tentatively fixed at Rs.\_\_\_\_\_/ - as per Or.18 R.4 (7) CPC Payable direct by ----- for their respective witnesses evidence [vide decision 2005[6] SCC 344 para 6 in SABA case – II.

5. You have to record the demeanor of witnesses or such other remarks or objections in the deposition as per order 18 Rule 4 (4) and Rule 12 C.P.C. while recording evidence only to the extent necessary.

6. The marking of any documents by you are only for reference sake, since it is the Court that has to decide ultimately for marking as per order 18, Rule 4(1) Proviso. (CRP Rule 113 (7) (g)).

7. The venue for recording evidence is at the Court premises or at the venue fixed by you with the consent of the parties or as fixed by the Court. (As per CRP Rule 113 (6) (b)).

8. You can take any records from the Court 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. (CRP – Rule 113(8)).

9. While submitting report or interim report, it is necessary for you to mention on the docket of the report/ memo, the details of which witness evidence you recorded and what documents marked for reference purpose by you for ultimate decision of the Court for purpose of marking.

10. You can take the assistance of the Court for any clarification in this regard by memo in writing.

11. You shall take notice that you shall not adjourn the recording of evidences without Court notice.

Given under my hand and the seal of this Court, this the --day --  
---, 2018.

-----**Judge**

The following precautions are required to be observed by you in recording of evidence:

1. In taking affidavit of any deponent as Chief examination – you must take it on oath of the deponent that the contents are true and as per say, read over and explained and understood and it bears his/ her thumb mark/ signature.

The endorsement by you must be on the affidavit, docket sheet to the above extent of the compliance as follows: “Taken the affidavit of the deponent as Chief Examination of PW/ DW as per the direction of the Court in the Commission warrant and on oath and on admission that the contents are true and as per his/ her say and it bears the deponent’s signature.

You must sign underneath the endorsement after taking the signature of the deponent.

2. For recording cross-examination, on a separate sheet, you must exercise the oath of the witness by endorsement that “Witness resumed on oath” today dt.-----. For cross examination, on the chief examination affidavit already taken”.

Cross examination: ....

3. At the end of the cross examination, you must take signature of the witness and endorse that “the contents – are read over and explained to the witness and admitted as true”, then you must sign in proof of the compliance.

As per amended civil orders of practice (G.O.Rt.1795 – dt.20-10-04)

113 – New Rule – Evidence – 113 (3) whenever the Court considers necessary – appoint commissioner from panel by rotation (4) If counsel from panel not available – Court for reasons to be recorded – appoint any Advocate or retired Judicial Officer as counsel. (5) The panel of counsel – Advocates must have sufficient experience & practicing in Courts & retired Judicial Officers.”

27. Accordingly and in the result, the Civil Revision Petition is dismissed. No costs.

Consequently, miscellaneous petitions, if any shall stand closed. No costs.

**JUSTICE Dr. B.SIVA SANKARA RAO**

Date: 31.01.2018

Note: L.R. Copy to be marked

(B/o)

ska