

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

Writ Petition NO. 7176 OF 2018

Satish Shrikrishna Kamath

...Petitioner

Versus

Shri Dilip Ramaraya Bhandarkar

Through Constituted Attorney Anil Nayak

...Respondent

....

Mr. Prayag B. Joshi a/w. Sahil Ansari i/b. Bipin J. Joshi, Advocate for the Petitioner.

Mr. G.N. Salunke i/b. Ajit M. Rajgole, Advocate for the Respondent.

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CORAM : R. G. KETKAR, J.

DATE : 01st FEBRUARY, 2019

P.C.

1. Not on board. At the request of Mr.Joshi taken up for admission.
2. Heard Mr.P.B. Joshi, learned counsel for the petitioner and Mr.G.N. Salunke, learned counsel for the respondent, at length.
3. By this Petition under Article 227 of the Constitution of India, the petitioner, hereinafter referred to as the 'defendant', has challenged the order dated 9.2.2018 passed by the learned Judge, Court Room No.26 of the Small Causes Court of Mumbai below Exhibit-15 in L.E. & C. Suit No.108/127 of 2014. By that order, the learned trial Judge allowed the application filed by the respondent, hereinafter referred to

as the 'plaintiff' and appointed Advocate Shri Ashwini R. Singh as Court Commissioner to record the cross-examination of the plaintiff. The plaintiff is directed to pay Rs.7,000/- as a Court Commissioner's fees. The Court Commissioner is directed to complete his work within one month from the date of the order.

4. In support of this petition, Mr. Joshi strenuously contended that the plaintiff has not given any cogent and convincing reason for recording his deposition through audio and video conferencing and / or conducting the cross-examination or deposition / trial through audio video conferencing. He submitted that in fact in the plaint, the plaintiff has asserted that he often used to visit India. If the plaintiff is visiting India often, he should make himself available for cross-examination so that the demeanor of the witness can be taken into consideration. He submitted that if the plaintiff is ready to pay the Court Commissioner as also the costs of the defendant's Advocate, the cross-examination can be conducted at his place, namely, in U.S.A. He has also invited my attention to the reply dated 25.1.2018 filed by the defendant. In paragraph-3 it is stated that no sufficient ground/reason is mentioned in the application for recording the testimony through audio and video conferencing / link.

5. Mr. Joshi further submitted that though the plaintiff did not

pray for appointment of the Court Commissioner, while passing the impugned order, the learned trial Judge also appointed the Court Commissioner for recording the cross-examination. Thus, the order goes beyond the prayers made in the application filed by the plaintiff.

6. In support of his submissions, he relied upon following decisions :

- (i) **State of Maharashtra Vs. Dr. Praful B. Desai, (2003) 4 SCC 601** and in particular paragraph-26 thereof. He submitted that while passing the impugned order, the learned trial Judge has also not directed precautions to be taken by the Court Commissioner while recording the evidence.
- (ii) **Santhini Vs. Vijaya Venketesh, (2018) 1 SCC 1** and in particular paragraphs-51 and 56 thereof.
- (iii) **Ameer Trading Corporation Limited Vs. Shapoorji Data Processing Ltd., (2004) 1 SCC 702.**
- (iv) **Zaishu Xie & Another Vs. The Oriental Insurance Company Ltd. & Ors., dated 31.10.2013 passed by Delhi High Court in CM(M) No.845/2013** and in particular paragraph-17 thereof.
- (v) **Twentieth Century Fox Film Vs. Nri Film Production Associates, AIR 2003 Kant 148** and in particular paragraph-7 thereof.

7. Mr. Joshi further submitted that even the application made by the plaintiff is premature as the learned trial Judge has yet to pass order on admissibility of the documents. He submitted that the application is also not affirmed by the plaintiff. For all these reasons he submitted that

the petition requires consideration.

8. On the other hand, Mr. Salunke has supported to the impugned order. He relied upon the decision of this Court in **Liverpool & London Steamship Protection & Indemnity Association Ltd. Vs. m.v. "Sea Success I" & another**, 2005(4) ALL MR 17. In this decision, the learned Single Judge has referred to the decision of Apex Court in **State of Maharashtra Vs. Dr. Praful B. Desai** (supra). He submitted that the application is affirmed by the plaintiff before the Indian Embassy in U.S.A. He further submitted that the defendant filed say to the application filed by the plaintiff for permission to lead secondary evidence. The defendant submitted that the documents referred at Sr. Nos.1, 4, 6, 7, 8, 12, 9, 10, 11, 13 and 14 excepting at Sr. Nos. 2, 3 & 5 be taken as a secondary evidence. He further submitted that the impugned order is purely discretionary in nature and, therefore, this Court will decline to exercise its power under Article 227 of the Constitution.

9. I have considered the rival submissions advanced by the learned counsel appearing for the parties. I have also perused the material on record. In the case of **State of Maharashtra Vs. Dr. Praful B. Desai** (supra), the Apex Court in paragraph-20 has observed that the recording of evidence Recording the evidence by video conferencing also

satisfies the object of Section 273 of Cr.P.C. that evidence be recorded in the presence of the accused.

10. In paragraph-21, it was observed that the advancement of science and technology is such that now it is possible to set up video conferencing equipment in the Court itself. In that case evidence would be recorded by the Magistrate or under his dictation in open Court. It was further observed that as a matter of prudence evidence by video-conferencing in open Court should be only if the witness is in a country which has an extradition treaty with India and under whose laws Contempt of Court and perjury are also punishable.

11. In paragraph-26, the Apex Court has laid down the guidelines which are to the following effect :

“26. To be remembered that what is being considered is recording evidence on commission. Fixing of time for recording evidence on commission is always the duty of the officer who has been deputed to so record evidence. Thus the officer recording the evidence would have the discretion to fix up the time in consultation with VSNL, who are experts in the field and who, will know which is the most convenient time for video conferencing with a person in USA. The Respondent and his counsel will have to make it convenient to attend at the time fixed by the concerned officer. If they do not remain present the Magistrate will take action, as provided in law, to compel attendance. We do not have the slightest doubt that the officer who will be deputed would be one who has authority to administer oaths. That officer will administer the oath. By now science and technology has progressed enough to not worry

about a video image/audio interruptions/distortions. Even if there are interruptions they would be of temporary duration. Undoubtedly an officer would have to be deputed, either from India or from the Consulate/Embassy in the country where the evidence is being recorded who would remain present when the evidence is being recorded and who will ensure that there is no other person in the room where the witness is sitting whilst the evidence is being recorded. That officer will ensure that the witness is not coached/tutored/prompted. It would be advisable, though not necessary, that the witness be asked to give evidence in a room in the Consulate/Embassy. As the evidence is being recorded on commission that evidence will subsequently be read into Court. Thus no question arises of the witness insulting the Court. If on reading the evidence the Court finds that the witness has perjured himself, just like in any other evidence on commission, the Court will ignore or disbelieve the evidence. It must be remembered that there have been cases where evidence is recorded on commission and by the time it is read in Court the witness has given evidence in a Court in India and that then gone away abroad. In all such cases Court would not have been able to take any action in perjury as by the time the evidence was considered, and it was ascertained that there was perjury, the witness was out of the jurisdiction of the Court. Even in those cases the Court could only ignore or disbelieve the evidence. The officer deputed will ensure that the Respondent, his counsel and one assistant are allowed in the studio when the evidence is being recorded. The officer will also ensure that the Respondent is not prevented from bringing into the studio the papers/documents which may be required by him or his counsel. We see no substance in this submission that it would be difficult to put documents or written material to the witness in cross-examination. It is now possible, to show to a party, with whom video conferencing is taking place, any amount of written material. The concerned

officer will ensure that once video conferencing commences, as far as possible, it is proceeded with without any adjournments. Further if it is found that Dr Greenberg is not attending at the time/s fixed, without any sufficient cause, then it would be open for the Magistrate to disallow recording of evidence by video conferencing. If the officer finds that Dr. Greenberg is not answering questions, the officer will make a memo of the same. Finally when the evidence is read in Court, this is an aspect which will be taken into consideration for testing the veracity of the evidence. Undoubtedly the costs of video conferencing would have to be borne by the State.”

12. In the case of **Santhini** (supra), the Apex Court was dealing with a case arising from the proceedings under the Family Courts Act, 1984. In paragraph-51, it was observed that there is no provision in the Act laying down that the matter can be dealt with by the Family Court Judge by taking recourse to videoconferencing. When a matter is not transferred and settlement proceedings takes place which is in the nature of reconciliation, it will be well nigh impossible to bridge the gap. What one party can communicate with other, if they are left alone for sometime, is not possible in videoconferencing and if possible, it is very doubtful whether the emotional bond can be established in a virtual meeting during videoconferencing. Videoconferencing may create a dent in the process of settlement.

13. In paragraph-56, it was observed that a genuine endeavour has to be made by the Family Court Judge, but in the name of efforts to

bring in a settlement or to arrive at a solution of the lis, the Family Court should not be chained by the tentacles by either parties. Perhaps, one of the parties may be interested in procrastinating the litigation. The Apex Court was, therefore, of the view that once a settlement is failed and if both the parties give consent that a witness can be examined in video conferencing, that can be allowed.

14. In paragraph-58, in clause (2), it was observed that after the settlement fails and when a joint application is filed or both the parties file their respective consent memorandum for hearing of the case through videoconferencing before the concerned Family Court, it may exercise the discretion to allow the said prayer.

15. In clause (3), it was observed that after the settlement fails, if the Family Court feels it appropriate having regard to the facts and circumstances of the case that videoconferencing will sub-serve the cause of justice, it may so direct.

16. Hon'ble Dr. Justice D.Y. Chandrachud gave dissenting opinion and recorded following conclusions :

- “3. Video conferencing is a technology which allows users in different locations to hold face to face meetings. Video conferencing is being used extensively the world over (India being no exception) in on line teaching, administration, meetings, negotiation, mediation and telemedicine among a myriad other uses. Video conferencing reduces cost, time, carbon footprint

and the like.

6. The above provisions-far from excluding the use of video conferencing-are sufficiently enabling to allow the Family Court to utilise technological advances to facilitate the purpose of achieving justice in resolving family conflicts. There may arise a variety of situations where in today's age and time parties are unable to come face to face for counselling or can do so only at such expense, delay or hardship which will defeat justice. One or both spouses may face genuine difficulties arising from the compulsions of employment, family circumstances (including the needs of young children), disability and social or economic handicaps in accessing a court situated in a location distant from where either or both parties reside or work. It would be inappropriate to deprive the Family Court which is vested with such wide powers and procedural flexibility to adopt video conferencing as a facilitative tool, where it is convenient and readily available. Whether video conferencing should be allowed must be determined on a case to case analysis to best effectuate the concern of providing just solutions. Far from such a procedure being excluded by the law, it will sub serve the purpose of the law.
8. Video conferencing is gender neutral. In fact it ensures that one of the spouses cannot procrastinate and delay the conclusion of the trial. Delay, it must be remembered, generally defeats the cause of a party which is not the dominant partner in a relationship. Asymmetries of power have a profound consequence in marital ties. Imposing an unwavering requirement of personal and physical presence (and exclusion of facilitative technological tools such as video conferencing) will result in a denial of justice.
9. The High Courts have allowed for video

conferencing in resolving family conflicts. A body of precedent has grown around the subject in the Indian context. The judges of the High Court should have a keen sense of awareness of prevailing social reality in their states and of the federal structure. Video conferencing has been adopted internationally in resolving conflicts within the family. There is a robust body of authoritative opinion on the subject which supports video conferencing, of course with adequate safeguards. Whether video conferencing should be allowed in a particular family dispute before the Family Court, the stage at which it should be allowed and the safeguards which should be followed should best be left to the High Courts while framing Rules on the subject. Subject to such rules, the use of video conferencing must be left to the careful exercise of discretion of the Family Court in each case.

10. The proposition that video conferencing can be permitted only after the conclusion of settlement proceedings (resultantly excluding it in the settlement process), and thereafter only when both parties agree to it does not accord either with the purpose or the provisions of the Family Courts Act 1984. Exclusion of video conferencing in the settlement process is not mandated either expressly or by necessary implication by the legislation. On the contrary the legislation has enabling provisions which are sufficiently broad to allow video conferencing. Confining it to the stage after the settlement process and in a situation where both parties have agreed will seriously impede access to justice. It will render the Family Court helpless to deal with human situations which merit flexible solutions. Worse still, it will enable one spouse to cause interminable delays thereby defeating the purpose for which a specialised court has been set up.”

17. In the case of **Zaishu Xie** (supra), the Delhi High Court in paragraph-17 directed conducting of video-conferencing by observing following terms and conditions :

- “(i) Evidence of the petitioner No. 1 shall be recorded through video conferencing between Delhi, India and Consulate General of India at Guangzhou, China.
- (ii) In Delhi, the video conferencing shall be conducted in the facilities available in the Video Conferencing Room at Tis Hazari Courts.
- (iii) The Incharge of the Video Conferencing Facilities at Tis Hazari Courts should be appointed as the Coordinator with regard to the technical aspects of video conferencing in the Consulate General of India at Guangzhou, China.
- (iv) The Consulate General of India at Guangzhou, China shall nominate a senior officer of India to facilitate the video conferencing. The officer nominated by the Indian Consulate General shall coordinate the video conferencing arrangements at Guangzhou, China and shall remain present at the time of recording of evidence of the petitioner No. 1.
- (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 the Interpreter is present at the time of video conferencing unless required under serial No. (xix) below.
- (vi) The officer nominated by the Consulate General of India shall verify the identity of the petitioner No. 1 before commencement of his examination.
- (vii) The Trial Court may appoint a Local

Commissioner, if deems fit or record on his own, for the purposes of recording the evidence of petitioner No. 1.

- (viii) As soon as identification part is complete, oath will be administered by the Local Commissioner so appointed by the Trial Court or by the Court itself through the media as per Oaths Act, 1969.
- (ix) The petitioner No. 1 shall be examined during working hours of Indian Courts. The plea of any inconvenience on account of time difference between India and China shall not be allowed. However, the convenience of the Consulate General of India at Guangzhou, China shall be taken into consideration in fixing the time and schedule.
- (x) The cross-examination, as far as practicable, be proceeded without any interruption and without granting unnecessary adjournments. However, discretion of the Local Commissioner shall be respected, if so appointed by the Trial Court.
- (xi) The Local Commissioner, if appointed, may record any material remarks regarding the demur of the petitioner No. 1 while on the screen and shall note the objections raised during recording of evidence.
- (xii) The deposition of the petitioner No. 1 shall be signed immediately in the presence of the nominated officer of the Consulate General of India at Guangzhou, China. The said officer shall certify/attest the signatures of the witness/petitioner No. 1.
- (xiii) 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 petitioners.
- (xiv) The Consulate General of India at Guangzhou, China shall provide an official translator to

facilitate the translation of questions from English language to Chinese language and answers from Chinese language to English language for the recording of evidence of petitioner No. 1 in English language.

- (xv) The petitioners shall bear the cost/expenses of the video conference. The expenses for the video conferencing to be undertaken in Beijing shall be informed to the petitioners through counsel by the Consulate General of India at Guangzhou, China. However, in case of any difficulty, the same may be communicated to the Incharge of the Video Conferencing facilities at Tis Hazari Courts by e-mail, who shall communicate the same to the petitioners' lawyer in India.
- (xvi) The officer of the Consulate General of India at Guangzhou, China to be nominated by the Consulate, shall be paid a lump sum amount of Rs. 50,000/- as honorarium by the petitioners.
- (xvii) The petitioners' counsel shall prepare certified copies of the entire court file of the Trial Court, which shall be forwarded to the office of the Consulate General of India at Guangzhou, China with the assistance of the Ministry of External Affairs, New Delhi.
- (xviii) This record shall be made available to the officer nominated by the Consulate General of India at Guangzhou, China for the purpose of undertaking the video conferencing as it would be necessary for recording the statement and cross-examination of the petitioner No. 1.
- (xix) In case, the respondents or their counsels are desirous of being physically present at Guangzhou, China, at the time of recording of the evidence, it shall be open for them to make arrangements on their own cost for appearance and their representation. The respondents shall ensure that

prior intimation in this regard is filed in the Registry of this Court giving full particulars and 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 the Consulate General of India at Guangzhou, China.

- (xx) The evidence should be recorded expeditiously and the entire proceedings before the learned Trial Court shall be disposed of in a time bound manner.”

18. The decision of **State of Maharashtra Vs. Dr. Praful B. Desai** (supra) was considered by this Court in **Liverpool & London Steamship Protection & Indemnity Association Ltd.** (supra). The learned Single Judge observed that the Apex Court held that examining of a witness by video conferencing is permissible and that in the case where the witness is unable to attend the Court or unable to travel to India, the Court should lean in favour of advancement of science and technology and see to it that evidence is recorded expeditiously in the interest of justice by way of video conferencing. The Apex Court has also provided various safeguards in paragraph-26 of the said judgment.

19. In view thereof, I do not find that the learned trial Judge has committed any error while passing the impugned order. It is however made clear that before recording of evidence of the plaintiff through video conferencing, the learned trial Judge will pass order on

admissibility of documents as also will take adequate precautions in terms of paragraph-26 of the decision of **State of Maharashtra Vs. Dr. Praful B. Desai** (supra) as also will try to follow the guidelines laid down in paragraph-17 of the Delhi High Court in **Zaishu Xie's** case (supra).

20. The order impugned is purely discretionary order. The defendant was not in a position to demonstrate that the discretion exercised by the learned trial Judge is capricious, perverse or arbitrary warranting interference at the hands of this Court in exercise of powers under Article 227 of the Constitution of India. Hence, Petition fails and the same is dismissed with no order as to costs.

21. It is made clear that where a decree is appealed from by the petitioner, any error, defect or irregularity in any order, affecting the decision of the case, may be set forth as a ground of objection in the memorandum of appeal as contemplated by section 105(1) of C.P.C.

(R. G. KETKAR, J.)

Deshmane (PS)