

THE HIGH COURT OF PUNJAB & HARYANA
AT CHANDIGARH

CRM-M-9197-2024
Reserved on : 23.04.2024
Pronounced on: 29.04.2024

Vicky VermaPetitioner

Versus

State of Punjab and othersRespondents

CORAM: HON'BLE MRS. JUSTICE MANJARI NEHRU KAUL

Argued by : Mr. Gaurav Chopra, Sr. Advocate with
Mr. Rajender Kumar, Advocate,
Mr. Mohit, Advocate and
Mr. Japsehaj Singh, Advocate
for the petitioner.

Mr. Amit Rana, Sr. DAG, Punjab.

Mr. Deepak Sabherwal, Special Public Prosecutor
for respondent No.2-CBI.

MANJARI NEHRU KAUL, J.

1. The petitioner is seeking quashing of order dated 15.02.2024 (Annexure P-4), passed by learned Special Judicial Magistrate, CBI, Punjab, SAS Nagar (Mohali) in case titled as 'Central Bureau of Investigation Vs. Gautam Cheema and others' in FIR No.RCCHG0512020S0001 dated 29.04.2020 under Section 120-B read with Section 452, 323, 365, 342, 225, 186, 506 of the Indian Penal Code, 1860 (hereinafter referred to as 'the IPC') registered at Police Station CBI/SCB/Chandigarh, on the ground that the evidence of private respondent-Kricpy Khera was recorded as PW-42, before learned CBI, Court, SAS Nagar (Mohali), without following the provisions of Code of Criminal Procedure, 1973 (hereinafter referred to

as 'the Cr.P.C.'), the Indian Evidence Act, 1872 and the applicable Punjab and Haryana High Court Rules and Standard Operating Procedure (SOP), and the objections raised by the petitioner qua the same were dismissed. The petitioner is further seeking directions for setting aside of the evidence recorded of the private respondent through the Video Conferencing (hereinafter referred to as 'VC').

Submissions of learned senior counsel for the petitioner

2. Learned senior counsel for the petitioner has made the following submissions:-

2 (i). That the petitioner was one of the accused in case titled as “Central Bureau of Investigation Vs. Gautam Cheema and others” in the FIR in question, registered at Police Station CBI/SCB/Chandigarh.

2 (ii). That the private respondent, a witness in the case, is a “Wanted Person”, with Look Out Circulars issued against her, and having been declared a proclaimed person in 19 cases with another 42 cases pending against her. Despite these criminal antecedents and pending cases against her, the private respondent managed to evade authorities and flee to Canada without permission from any competent Court.

2 (iii). That the learned CBI Court issued summons to the private respondent for her examination, but she could not be served as she was residing abroad. However, the prosecution presented a screen shot of WhatsApp chat allegedly sent by the private respondent, expressing her readiness to appear through Video Call. The learned CBI Court, vide order dated 04.09.2023, granted permission to the prosecution to

examine the private respondent through 'Virtual Mode' as per the Standard Operating Procedure (SOP) outlined by the High Court for witnesses residing abroad. In support, learned senior counsel has drawn the attention of this Court to Annexure P-1. Further, the learned CBI Court, vide order dated 09.11.2023, issued directions to the prosecution to send a request letter to the Canadian Authorities for making arrangements to record the statement of the private respondent. In support, learned senior counsel has drawn the attention of this Court to Annexure P-2. Pursuant to the orders of the CBI Court, the private respondent appeared on 15.02.2024 as PW-42, and got her deposition recorded via VC.

2 (iv). That the testimony of the private respondent was, however, recorded in violation of the provisions of the Cr.P.C., the Indian Evidence Act, 1872 and the High Court Video Conferencing Rules (hereinafter referred to as 'Rules') and Orders.

2 (v). That while drawing the attention of this Court to Rule 5.1, it has been argued that a Coordinator, has to be present both at the Court and the Remote Point, during examination of a witness. While the requirement for a Remote Point Coordinator may arise in any of the many situations delineated under Rule 5.3, the word “shall” used thereafter indicates that only individuals specified in corresponding situations can act as Remote Point Coordinators. Specifically, , if evidence of a witness is to be recorded overseas, as in the present case, Rule 5.3.1 mandates that the Remote Point Coordinator must be an official of the Indian Embassy/High Commission/Consulate.

2 (vi). That the Rules explicitly mandate an official of the Indian Embassy/High Commission/Consulate only as the Remote Point Coordinator, and cannot be interpreted to include their authorised representative to act as Remote Point Coordinator when evidence is being recorded through virtual mode. The cardinal rule of statutory interpretation is that where a statute provides that a certain thing should be done, it must be done in the manner prescribed and not in any other way. Since the Rules framed by this High Court carry statutory force, only the authorities prescribed therein can act as Remote Point Coordinator. However, in the present case, the Canadian Police Constables, and not any official of the authorities prescribed in R. 5.3.1, were present during recording of the evidence of the private respondent, which was violative of the Rules. In fact, it is apparent that the authorities prescribed in R. 5.3.1 were not even associated in any way in the appointment of the Remote Point Coordinator nor had any request been extended by them to the authorities concerned for being appointed as the Remote Point Coordinator. In support of his submissions, learned senior counsel has placed reliance on the case of ***Dhananjaya Reddy vs. State of Karnataka 2001 (4) SCC 9.***

2 (vii). That once there had been a blatant violation of the Rules in appointment of the Remote Point Coordinator, who was also tasked with establishing the identity of the witness, it raised genuine doubts about the identity of the witness i.e. the private respondent, and also cast doubt on the sanctity and validity of the evidence, so recorded.

2 (viii). It has been vehemently argued and asserted that in the aforementioned facts and circumstances, the evidence of the private respondent required to be discarded.

Submissions of learned Special Public Prosecutor for CBI

3. Learned Special Public Prosecutor appearing for CBI, while opposing the submissions and prayer of the learned senior counsel for the petitioner, has made the following submissions:-

3 (i). That the private respondent/witness Kricpy Khara sent two emails to the CBI on 14.09.2023 and 30.10.2023 (annexed as Annexures A-6 and A-7), seeking her examination through VC, due to the prevalence of threats to her life.

3 (ii). That the learned CBI Court was then requested for getting the private respondent examined through VC which request was allowed by the CBI Court vide order dated 04.09.23 (Annex P-1)

3 (iii). That the CBI Court, thereafter, directed the prosecution to furnish the requisite details of the witness as per Schedule II of the Video Conferencing Rules.

3 (iv). That the details of the witness i.e. the private respondent was provided, as per the directions issued by the learned CBI Court, as is evidenced in its order dated 09.11.2023 (Annexure P-2). The CBI Court further directed the Indian authorities concerned for sending a request letter to the Canadian authorities for facilitation of recording of evidence of the private respondent through VC.

3 (v). That in a communication sent by the learned CBI Court vide letter dated 453 dated 09.11.2023 (Annexure A-5), through the learned District and Sessions Judge, SAS Nagar (Endorsement No.9784

dated 14.11.2023 Annexure A-5), corresponded with the Under Secretary, Ministry of Home Affairs (MHA), New Delhi for recording the examination of the private respondent through VC since she was residing in Canada. One letter (bearing No.454 dated 09.11.2023 of Special Judicial Magistrate, CBI, through District and Sessions Judge, SAS Nagar) was also sent to the Consul General, Consulate General of India at Vancouver, Canada vide CBI, Chandigarh forwarding letter No.3975 dated 17.11.2023 (Annexure A6).

3 (vi). That the MHA in a letter No.25012/04/2023-Legal Cell(Pt.VI)(01) dated 21.11.2023 (Annexure A-7) notified the CBI that the documents sent to the Ministry lacked certain requirements.

3 (vii). That after fulfilling the requirements, the learned CBI Court, then, sent letters to the Under Secretary, MHA, and the Consulate General of India, Vancouver, Canada on 01.12.2023 (bearing letter No.481 dated 01.12.2023 and one letter bearing endorsement No.482 dated 01.12.2023 respectively), for the recording of the evidence of the private respondent vide Annexure A-8. These letters along with enclosures, were forwarded to the MHA by CBI Chandigarh vide forwarding letter No.4256 dated 04.12.2023 (Annexure P-9), for further action.

3 (viii). That subsequently the MHA forwarded the documents to the High Commissioner of India at Ottawa and International Assistance Group, Criminal Law Division, Department of Justice, Canada, to pursue the request (Annexure A-10).

3 (ix). That on 18.01.2024, CBI received an email from International Assistance Group, Criminal Law Division, Department of

Justice, Canada, acknowledging India's request for mutual legal assistance regarding recording of the testimony of the private respondent in the instant case (Annexure A-11).

3 (x). That thereafter examination of private respondent was conducted through VC on 15.02.2024, continuing to 21.02.2024, 26.02.2024, 29.02.2024 and concluding on 06.03.2024.

3 (xi). That in its order dated 15.02.2024, the learned CBI Court noted certain queries raised by the learned defence counsel for the accused questioning the authority of the Remote Point Coordinators. (Annexure P-4).

3 (xii). That as a precautionary measure, the learned CBI Court also requested the MHA to confirm whether the officials present during examination of the private respondent had been duly authorised or not. The MHA addressed this by writing to the Department of Justice, Canada, which vide an email dated 15.03.2024, confirmed the authorization of the mentioned officials as Remote Point Coordinators.

3 (xiii). That the Rules framed by the High Court have to be considered in conjunction with the guidelines formulated by the MHA on Mutual Legal Assistance in Criminal Matters (MLA) (Annexure A-7(2)), covering the procedure and protocol for recording evidence in criminal case in a foreign country.

3 (xiv). That due to the distinct legal framework of each country, the Indian Embassy/High Commission/Consulates are not authorised to directly solicit the Central Authority of a foreign nation for appointment of Remote Point Coordinators. In all such cases, request for legal assistance to foreign country, are to be made through the MHA.

Accordingly, all requests and communications must adhere to the established norms. In the case at hand, all requisite information was routed through proper channels, and necessary authorizations was received through Central Authorities, designated as per the guidelines, i.e. MHA in India and the International Assistance Group, Department of Justice in Canada. Attention of this court has been drawn to No.1.7 of the Guidelines [Annexure-7(2)].

3 (xv). That the Guidelines on Mutual Legal Assistance (MLA), Schedule IV “C” and “D” as well as Part V “A” delineate the pertinent procedures for recording evidence via audio visual means. Point 4.9 stipulates the Coordinators must be appointed by the Central Authorities of the requesting country and the requested country i.e. MHA in India and International Legal Assistance Group, Department of Justice in Canada.

3 (xvi). That correspondence received from the Department of Justice, Canada unequivocally confirmed compliance with the aforesaid procedure, as the officials who were present with the witness during her testimony as Remote Point Coordinators were duly authorised by the Central Authority of Canada.

3 (xvii). That furthermore use of term “may” in Rule 5.3 of the Video Conferencing Rules, indicates that appointment of an official of the Indian High Commission as the Remote Point Coordinator is not mandatory. Any duly authorised official can function as a Remote Point Coordinator.

3 (xviii). That while the VC Rules regulate the procedure for recording evidence via VC to ensure its integrity, the MHA guidelines

on MLA also outline procedures for recording evidence in foreign countries to facilitate smooth legal assistance exchange. Both sets of Rules and guidelines are inter-dependent and should not be construed in isolation.

3 (xix). That vide Rule 18 of the VC Rules, the High Court has the powers to relax operation of Rules in case of undue hardship. In this case, the witness has been facing serious threats to her life for testifying against a very senior police official, as is evident from the emails sent by her to the MHA.

3 (xx). That furthermore, Rule 19 of the Rules empowers the Court to decide the matter in furtherance of interest of justice, in situations where no explicit Rules are in place. In the present case the private respondent was traced with great difficulty by the CBI and is still apprehending threats at the hands of the accused even while living in Canada. Given the extensive communication and efforts between two countries, reverting proceedings would disproportionately burden the prosecution. Moreover, the petitioner has not been prejudiced in any manner, as extensive cross-examination was conducted on the witness (private respondent); the identity of the witness was duly proved during the VC proceedings, where she presented her Aadhaar Card through the virtual mode to the Presiding Officer and the authorised officials who acted as Remote Point Coordinators during each and every date when she testified through the virtual mode. In such a case, if her evidence was to be set aside, then the interest of justice would greatly suffer.

Rebuttal by learned senior counsel for the petitioner

4. Rebutting the contentions raised by the learned counsel for CBI, the learned senior counsel for the petitioner submits that the power to relax the Rules lies solely with the High Court and not with the CBI Court. Therefore, the CBI Court had no authority to relax these Rules and allow Canadian Police Officials, who did not meet the criteria specified under Rule 5.3.1, to serve as Remote Point Coordinators.

5. I have heard learned counsel for the parties and perused the relevant material on record.

FINDINGS OF THE COURT

6. In order to elucidate the circumstances surrounding the case at hand, it is imperative to delineate a succinct chronology of events. The key figure herein i.e. the private respondent Kricpy Khara, who is a witness in the ongoing trial, left India for Canada during the course of trial, fearing for her safety and freedom. Despite repeated summons sent to her from the learned CBI Court to testify, she could not be located at the given address. The investigating officer in a statement made before the learned CBI Court (Annexure P-1), also attested to the exhaustive efforts undertaken to procure the presence of the private respondent for her examination; later he presented a screen shot of a WhatsApp Chat wherein the private respondent expressed her willingness to testify virtually.

7. Recognizing the urgency of the situation, the CBI then moved an application for permission to examine this witness via virtual mode, in accordance with the guidelines established by this High Court.

The learned CBI Court vide order dated 04.09.2023 (Annexure P-1) granted permission to the CBI. Subsequently, the private respondent, communicated that she would want to testify through virtual mode by sending two emails dated 14.09.2023 (Annexure A-2) and 30.10.2023, (Annexure A-3) citing persistent threats that she faced from the accused, as being a reason for her inability to testify in person.

8. On 09.11.2023, the prosecution/CBI provided the requisite details outlined in Schedule II of the High Court VC Rules to initiate the process for the virtual examination of the private respondent. Concerned for her safety, the prosecution requested non-disclosure of her whereabouts to the accused, emphasizing the difficulty in locating her as also the continuous threats to her life even after leaving India. Acknowledging these concerns, the learned CBI Court in its order dated 09.11.2023, (Annexure P-2) directed the issuance of a request letter to the Canadian Authorities to facilitate the virtual testimony of the private respondent.

9. Efforts to arrange for her testimony encountered obstacles when the MHA returned the initial request letter on 21.11.2023, citing lack of certain required documents. Subsequently, after providing the requested documents, the learned CBI Court issued a fresh notice to the MHA on 01.12.2023 with a separate letter addressed to the Consul General, Consulate General of India. Upon receipt of the letter from the learned CBI Court, the MHA requested Consulate General of India at Canada, and the Associate Director and General Counsel, International Assistance Group, Criminal Law Division, Department of Justice Canada for making necessary arrangement for facilitation of recording

of the private respondent's evidence through the VC (Annexed as A-10). Vide an email dated 18.01.2024, the Canadian authorities i.e. Senior Paralegal, International Assistance Group, Department of Justice Canada, informed the MHA that they were in receipt of India's request for mutual legal assistance seeking witness testimony of Ms. Kricpy Khera (Annexure A-11). Thereafter, on 15.02.2024, the private respondent appeared as a witness through the VC for recording her evidence. In this regard, she was accompanied by the Remote Point Coordinator namely Constable, Deanne Van Raalte and another officer namely Courtney Whyte. However, during the testimony of the witness, an objection was raised by the defence Counsel for the accused Remote Point Coordinator was not duly authorized per the Rules, therefore the final confirmation of the authorised personnel overseeing the virtual testimony was sought by the learned Trial Court, prompting the MHA to address the matter.

10. In response, the Department of Justice, Canada, confirmed the successful execution of the request made by the MHA for recording the testimony of the private respondent via video link, verifying the authorization of the Coordinating Officers involved. After the testimony of the witness had been recorded as PW-42, the petitioner herein, impugned the decision of the learned CBI Court allowing the private respondent's testimony to be recorded virtually, on the ground that Canadian Police Officials had acted as Remote Point Coordinators instead of officials from the Indian High Commission which was contrary to the mandate of Rule 5.3.1 of the VC Rules. It was vehemently argued by learned senior counsel for the petitioner that the

absence of duly authorised officials compromised the identity of the witness, rendering her testimony invalid and liable to be set aside. He has further argued that the authorities prescribed under Rule 5.3.1 were not even associated in the process of appointing the Remote Point Coordinators as no communication/request had been extended by them to the authorities concerned in this regard.

11. This Court, thus, concurs with the arguments put forth by the CBI regarding necessity of adhering not only to the High Court VC Rules but also to the guidelines set forth by the MHA for MLA in criminal matters. These guidelines, governing international communications and relations between India and foreign nations, must be followed diligently, as any deviation from them could impede communication with the foreign country where the testimony of the witness is to be recorded.

12. It is crucial to recognise that when evidence needs to be recorded beyond the jurisdiction of India, the High Court VC Rules cannot operate in isolation. These Rules lack provisions for specific procedures required when seeking assistance from foreign Governments. In order to determine its diplomatic relations with other countries, the Union of India has formulated certain protocols for interaction with foreign Governments/Authorities. To this end, the Government has established Mutual Legal Assistance Treaties (MLAT) with various nations and has promulgated guidelines for authorities to follow when seeking legal assistance, a practice predating the High Court VC Rules. The investigating agencies across the nation have

consistently adhered to these guidelines when recording testimony of witnesses overseas, predating the application of the VC Rules.

13. Guideline 1.7 (which is reproduced hereinunder) stipulates that formal requests for MLA must be directed from the Central Authority of India namely the MHA, to the corresponding authority in the other country, in this case, Canada's International Assistance Group, Department of Justice.

“1.7 Mutual Legal Assistance Request in the Indian context is a formal request made by the Central Authority of India i.e., Ministry of Home Affairs to the Central Authority of another country on the request of Investigating Officer or Agency under any Bilateral Treaty/Agreement, Multilateral Treaty/Agreement or International Convention.”

14. Given that all formal requests and communications for international assistance are to be facilitated between the MHA and the Department of Justice, Canada, the contention of the petitioner that requests for recording witness's testimony via VC should have been made directly by the authorities specified in Rule 5.3.1, is meritless. As per the prescribed procedure in the guidelines, these authorities could not have independently approached Canadian counterparts to arrange for the witness testimony via VC.

15. It is crucial to underscore that the High Court VC Rules, though comprehensive, cannot anticipate every conceivable scenario, for instance, they may not account for situations where the laws of a foreign nation prohibit the appointment of an official from the Indian Consulate/High Commission/Embassy as a Coordinator. Although this is not an issue in the present case, it illustrates the need for flexibility

within the Rules. Similarly, the Rules do not anticipate a scenario where the procedure outlined in the guidelines issued by the MHA is followed for recording the evidence of a witness overseas which may be at slight variance from the Rules framed by this Court.

16. To address such unforeseen circumstances and ensure that procedural technicalities do not impede the interest of justice, Rule 19 has been incorporated into the Rules, empowering the Court to navigate these complexities effectively so that the interest of justice is not thwarted. Rule 19 of the VC Rules is reproduced hereinunder for ready reference:-

“19. Residual Provisions

Matters with respect to which no express provision has been made in these Rules, shall be decided by the Court consistent with the principle of furthering the interests of justice.”

17. Hence, it is imperative for this Court to adjudicate upon the present matter in a manner that serves the paramount interest of justice. A hyper-technical interpretation of the Rules would defeat their underlying objective, which is to facilitate witness testimony in circumstances where physical presence of the witnesses may not be possible or feasible.

18. In the given background of the instant case, where diplomatic relations between two sovereign countries are involved, and a procedure for Mutual Legal Assistance (MLA) has been agreed upon between them, due compliance of such procedure would be sufficient

compliance for the purpose of recording evidence through the video-conferencing mode.

19. In the instant case, the Learned Counsel for the CBI has made a categorical statement that the MLA guidelines promulgated by the MHA have been duly complied with. In this context, it is pertinent to refer to the following guidelines issued by the MHA which detail the procedure for recording statements through audio video means:-

“4.9 The coordinators are to be appointed for recording of statement by audio-visual means by the Central Authority/Court in India as well as the Competent Authority in Requested Country. For the Requested Country the coordinator may be the Central Authority of Requested Country or if the law of Requested Country permits the official of Consulate/Embassy of India.”

20. This Court has also duly noted that the MHA, Central Authority of India, issued a letter (Annexure A-10) expressly soliciting the High Commission of India in Canada and the International Assistance Group, Criminal Law Division, Department of Justice, Canada, to facilitate the recording of the testimony of the private respondent via VC. Moreover, a communication dated 15.03.2024 from the International Assistance Group, Department of Justice, Canada, unequivocally affirmed that Canadian Authorities had successfully executed the request of the Indian Authorities for the examination of the private respondent via video link. Furthermore, it also confirmed the authorization of the Coordinating Officers involved in the video link coordination. Consequently, it is irrefutable that the CBI diligently undertook necessary steps in accordance with established guidelines.

As an upshot to the above, this Court has no hesitation to hold that the

officials overseeing the examination of the witness via VC were duly authorised as Remote Point Coordinators, and had thus duly identified the witness i.e. private respondent. It is certainly not even the case of the petitioner that the witness was being impersonated by someone on the dates her testimony was being recorded, as it has not even been brought to the notice of this Court that any such suggestion had been put to her during her cross examination in this regard.

21. Furthermore, prior to recording the testimony of the private respondent/witness, rigorous procedures were meticulously followed as per the Rules, by the Presiding Officer including room scan via the camera to ensure privacy and the absence of any unauthorised persons, other than the Remote Point Coordinators, before each date of her testimony, to ensure sanctity of evidence of the witness. Still further, the identity of the witness was duly established by the Remote Point Coordinators authorized in this regard, and verified through the presentation of her Aadhaar Card via VC, to the satisfaction of the Presiding Officer, with both the prosecution/CBI and defence lawyers present throughout the proceedings. Furthermore, the testimony of the private respondent admittedly was recorded in the presence of two Canadian police officials, and they would have had no reason not to dispassionately have the testimony in question recorded.

22. Accordingly, this Court does not find any merit in the contention of the petitioner that the identity of the private respondent could not be established because the officials overseeing her testimony via VC were not authorised as Remote Point Coordinators.

23. In the peculiar facts and circumstances of this case, wherein PW-42, a pivotal witness, was painstakingly located by the CBI and continues to face threats from the accused, even while residing in Canada, and diligent efforts were undertaken to record her testimony with international cooperation, notably from Canadian Authorities, the dispensation of justice would be compromised if the testimony of this most crucial witness was to be discarded or even ordered to be re-recorded. This is especially pertinent considering the directive by Hon'ble the Supreme Court in the instant case for the conclusion of the trial in a time bound manner.

24. No other ground has been raised by the learned senior counsel for the petitioner.

25. In the circumstances, the instant petition is hereby dismissed.

26. However, it is made clear that anything observed hereinabove shall not be construed to be an expression of opinion on the merits of the case.

29.04.2024

Vinay

(MANJARI NEHRU KAUL)
JUDGE

Whether speaking/reasoned	:	Yes/No
Whether reportable	:	Yes/No