

ELECTRONIC RECORDING OF EVIDENCE IN CIVIL SUITS

I. Overview:

One of the most crucial stages in trials of civil suits is recording of evidence of witnesses. Whereas the Indian Courts and tribunals have conventionally preferred the physical mode of recording of evidence wherein witnesses are examined on oath *in persona* or by way of affidavits, there has been a gradual yet steady shift to increasing use of electronic or audio-visual means for the purpose in the recent past. We believe that the pace of this shift to electronic means will inevitably increase on account of and on the back of manifest utility of electronic media in times such as those presently prevalent and a necessary consequence thereof will entail, *inter alia*, a shift to video conferencing/recording of evidence in civil suits. From this viewpoint and with this foresight, the instant article explores the position of Indian law on video recording/conferencing of evidence in civil suits as defined by the relevant provisions of substantive and procedural enactments including the Code of Civil Procedure, 1908 (the ‘**Civil Procedure Code**’) and producing such recording in evidence in consonance with the relevant provisions under the Indian Evidence Act, 1872 (the ‘**Evidence Act**’); and as evolved and expounded by case law or judicial precedents.

II. Substantive and procedural law:

A. Civil Procedure Code:

Section 30 of the Civil Procedure Code empowers Courts to make orders deemed necessary or reasonable in all matters relating to, *inter alia*, admission of documents and facts, thereby constituting a broader power vested in Courts to make any order deemed appropriate in respect of matters of evidence. Supplemented with the power of certain High Courts to make rules, vested in terms of Section 122 of the Civil Procedure Code and the saving of inherent powers of Courts by Section 151 of the Civil Procedure Code, the Courts are sufficiently empowered to enable as well as regularly expand the provisions for video recording/conferencing of evidence.

Order XVI in the First Schedule of the Civil Procedure Code provides for summoning and attendance of witnesses. In our opinion, the preference of the word “attendance” for witnesses summoned to give evidence or produce documents and the evidently pre-contemplated distinction thereof from a witnesses’ ‘attendance in person’ sufficiently enables Courts to direct witnesses to be examined electronically or *vide* audio-visual means.

More pertinently, Order XVIII in the First Schedule of the Civil Procedure Code provides for hearing of the suit and examination of witnesses and specifically, Rule 4 thereunder¹ governs the procedure for recording of evidence. While Rule 4(1) of Order XVIII mandates examination-in-chief of each witness to be on an affidavit, Rule 4(2) of Order XVIII is more permissive in allowing cross-

¹ Inserted by the Code of Civil Procedure (Amendment) Act, 2002.

examination and re-examination of the attending witness to be taken either directly by Court or indirectly through a commissioner² appointed by Court for the purpose. Significantly in the context of non-physical means for recording of witnesses' evidence, Rule 4(3) of Order XVIII of the Civil Procedure Code permits recording of evidence either in writing or "mechanically".

In providing for appealable cases too, the Civil Procedure Code recognizes the utility of a 'mechanical' recording of witnesses' evidence for assessment and appreciation of the record and the findings of the trial Court by the appellate Court under Rule 5 of Order XVIII of the Civil Procedure Code. Even for unappealable cases, Rule 13 of Order XVIII makes a provision for at least a memorandum of the substance of deposition of witnesses to be recorded "mechanically", besides the other usual modes of recording of deposition.

The inclusion of provisions enabling evidence of witnesses to be recorded "mechanically", as will be discussed below, has been interpreted and expounded by judicial precedents to contemplate and permit use of electronic or audio-visual media for recording of witnesses' evidence.

B. Evidence Act:

Vide a key amendment to the Evidence Act effective 17th October 2000, *inter alia*, Section 65A and Section 65B were inserted in the Evidence Act and have since permitted information contained in an electronic record to be deemed to be a document for evidentiary purposes, so long as the contents of such electronic record are proved in accordance with the provisions of Section 65B of the Evidence Act. Therefore, the amendment of the Evidence Act in the year 2000 followed by the amendment of the Civil Procedure Code in the year 2002 have laid the primary foundation for enabling electronic recording of evidence (by video recording/conferencing) to be produced as evidence in accordance with Section 65B of the Evidence Act.

III. Judicial precedents:

Although there is a catena of significantly relevant judicial precedents which have expounded and evolved the position of Indian law in permitting electronic recording of witnesses' evidence in various categories of litigations including criminal prosecutions³, matrimonial and family disputes⁴, *et cetera*, the authors have restricted the discussion below to relevant judicial precedents on the subject in relation to civil suits alone.

² Issued by Courts in terms of the power vested by Section 75 of the Code of Civil Procedure, 1908, *inter alia*, "to examine any person".

³ Such as in the Judgment of the Hon'ble Supreme Court of India in the case of The State of Maharashtra Vs. Dr. Praful B. Desai and Anr., reported in (2003)4SCC601, decided on 1st April 2003.

⁴ Such as in the Judgment of the Hon'ble Supreme Court of India in the case of Santhini Vs. Vijaya Venketesh, reported in 20181SCC1, decided on 9th October 2017.

The most relevant precedent on the above subject would be one by which the apex Court ruled on the constitutional validity of the Amendment Act 46 of 1999 and the Amendment Act 22 of 2002 which, *inter alia*, inserted the provisions enabling evidence of witnesses to be recorded “mechanically” in terms of Rule 4 of Order XVIII of the Civil Procedure Code. The precedent under reference is the Judgment of the Hon’ble Supreme Court of India in the case of Salem Advocate Bar Association Vs. Union of India (UOI)⁵ which held the said amendments to the Civil Procedure Code under challenge as not being *ultra vires* the Constitution of India and further issued certain clarifications respecting practical difficulties likely to be faced in implementing the said amendments under challenge. Relevantly with reference to Rule 4 of Order XVIII of the Civil Procedure Code, the Hon’ble Supreme Court of India held that the “*use of the word 'mechanically' indicates that the evidence can be recorded even with the help of the electronic media, audio or audiovisual*” and in fact recommended at least a simultaneous “*audio recording of the statement of the witnesses*” before Commissioners “*so as to obviate any controversy at a later stage*”.

Shortly after the above Judgment validated the amendment of the Civil Procedure Code inserting the present Rule 4 in Order XVIII of the Civil Procedure Code and enabling evidence of witnesses to be recorded “mechanically”, the Hon’ble High Court of Karnataka had an opportunity to analyze the provisions of Rule 4 of Order XVIII to adjudicate upon the permissibility of audio-video link for examination of witnesses in the United States of America, when its Judgment in the case of Twentieth Century Fox Film Corporation and Anr. Vs. NRI Film Production Associates (P) Ltd.⁶ held that “*mere non-physical attendance by itself does not prohibit examination of a witness by way of Audio-Video link*”.

More recently in 2018, the Hon’ble High Court of Andhra Pradesh and Telangana at Hyderabad, in its Judgment in the case of V. Rama Naidu and Anr. V. Smt. V. Ramadevi⁷, has relied on the above Judgment of the Hon’ble Supreme Court of India in the case of Salem Advocate Bar Association Vs. Union of India (UOI) and further elaborated on the statutory permissibility of electronic or audio-visual media for recording of witnesses’ evidence in civil suits, *inter alia*, in ruling 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*”.

Besides the above judicial precedents, there are instances of similar electronic or audio-visual media having been permitted for examination of witnesses in the context of an arbitration proceeding⁸ and an admiralty suit⁹ and there are also instances of the Hon’ble Supreme Court of India having

⁵ Reported in AIR2003SC189, decided on 25th October 2002.

⁶ Reported in AIR 2003 Kant 148, decided on 9th January 2003.

⁷ Reported in 2018SCCHYD210, decided on 31st January 2018.

⁸ Such as in the Judgment of the Hon’ble Delhi High Court in the case of Alcatel India Limited and Anr. Vs. Koshika Telecom Limited and Ors., reported in 2004(3)ARBLR107Delhi, decided on 6th September 2004.

⁹ Such as in the Judgment of the Hon’ble High Court of Judicature at Bombay in the case of Liverpool & London Steamship Protection & Indemnity Association Ltd. Vs. m. v. “Sea Success I” & Anr., reported in (2005)6BomCR278, decided on 16th June 2005.

permitted examination of foreign experts *vide* internet conferencing instead of video conferencing¹⁰ and of the Hon'ble Delhi High Court having permitted recording of testimony and cross-examination of a witness *vide* audio-video conferencing subject to extensive conditions stipulated by the Court¹¹.

IV. Video-recording and video-conferencing conundrum:

In a recent suit for rent and eviction filed under the Maharashtra Rent Control Act, 1999 before the Hon'ble Court of Small Causes at Mumbai, an application for video-recording of cross-examination of a witness to highlight the witnesses' demeanor during cross-examination before a Court-appointed commissioner was rejected with the reasoning that although video-conferencing of examination seemed to be permitted in law, there did not seem to be a provision permitting video-recording thereof; yet however, in a challenge to the said rejection, the Hon'ble Court of Small Causes at Mumbai (Appellate Bench), relying on, *inter alia*, an Order dated 6th June 2018 of the Hon'ble High Court of Judicature at Bombay¹², permitted video-recording of the witnesses' cross-examination before the Court-appointed commissioner¹³. The said video recording, however, would have to be produced before the trial Court.

V. Conclusion:

The advantages of adoption of electronic/audio-visual media for recording of evidence are multifold, especially including speedy disposal of proceedings; improved accessibility of witnesses and experts situated out of a Court's jurisdiction or unable to attend Court in person on account of any other difficulty/disability; reduced costs of judicial processes and for parties and witnesses; improved visibility of conduct and demeanor of the parties and witnesses in examination and other proceedings before commissions issued by Court; improved record-keeping for future reference of Court; and reduced burden on the judiciary.

Even with the multiplicity of advantages, it remains arguable if the Indian judicial system is completely equipped at present to mitigate or remedy the difficulties that come with adoption of electronic/audio-visual media for conduct of proceedings, ranging from security concerns to the lack of necessary infrastructure with litigants and Courts alike. While steps to address the difficulties have started to be taken such as in the form of detailed Guidelines issued by the Hon'ble Delhi High Court for video-conferencing for the conduct of court proceedings¹⁴, with difficulties of the kind posed by

¹⁰ In the Judgment in the case of Kunal Saha Vs. Sukumar Mukherjee & Ors., decided on 7th April 2011

¹¹ In the Judgment in the case of International Planned Parenthood Federation (IPPF) Vs. Madhu Bala Nath, decided on 7th January 2016.

¹² Passed in Testamentary Suit No.143 of 2014 in the case of Nima Keerthy Alias Nima Desai Vs. Snehalata Kaushik Desai.

¹³ By Judgment in the case of Mrs. Molly D'Souza Vs. Mr. Anthony Patrick Lewis and Anr., decided on 30th November 2019.

¹⁴ Available at the link –

http://delhihighcourt.nic.in/writereaddata/Upload/PublicNotices/PublicNotice_CQ84SWB5.PDF.

the current COVID-19 lockdown situation, there cannot be a more opportune time for other Courts to follow suit in better enabling use of electronic/audio-visual media for recording of evidence.

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