



THE HIGH COURT OF SIKKIM : GANGTOK

(Civil Extraordinary Jurisdiction)

DATED : 3rd December, 2021

SINGLE BENCH : THE HON'BLE MRS. JUSTICE MEENAKSHI MADAN RAI, JUDGE

WP(C) No.44 of 2021

Petitioners : The Karmapa Charitable Trust and Others

versus

Respondents : State of Sikkim of Sikkim and Others

and

WP(C) No.45 of 2021

Petitioners : The Karmapa Charitable Trust and Others

versus

Respondents : State of Sikkim of Sikkim and Others

**Petitions under Articles 226 and 227
of the Constitution of India**

Appearance

Mr. B. Sharma, Senior Advocate with Mr. S. P. Mukherjee, Mr. S. K. Pandey, Mr. Norden Tshering Bhutia and Ms. Rachana Shilal, Advocates for the Petitioners.

Mr. Yadev Sharma, Government Advocate for the Respondents No.1 and 2.

Mr. Anmole Prasad and Mr. N. Rai, Senior Advocates with Ms. Yangchen D. Gyatso, Mr. Sagar Chettri and Ms. Anita Pariyar, Advocates for the Respondent No.3.

ORDER

Meenakshi Madan Rai, J.

1. WP(C) No.44 of 2021 and WP(C) No.45 of 2021 are being disposed of by this common Order.

WP(C) No.44 of 2021

2. The Learned Trial Court in Title Suit No.01 of 2017 vide its Order dated 21-07-2021, allowed 4 (four) witnesses of the Defendant No.3, Respondent No.3 herein, to be examined through



Video Conferencing (for short, "VC"). Assailing the Order in WP(C) No.44 of 2021, Learned Counsel for the Petitioners advanced the argument that the only ground raised by the Learned Senior Counsel for the Respondent No.3 for examination of the 4 (four) witnesses by VC was the prevalence of the Covid-19 Pandemic and that it would not be possible for the witnesses, who are aged between 60 and 82 years, to travel to Gangtok in the said circumstances. Attention of this Court was drawn to the provision of Rule 2 Clause (viii) of the VC Rules, 2020, which provides for exceptional circumstances in which VC is to be held which includes Pandemic, Natural Calamities and circumstances implicating Law and Order and matters relating to the safety of the accused and witnesses. That, no exceptional circumstance has been made out by the Respondent No.3 as required by the provision and it is now an accepted position that the Covid-19 Pandemic has substantially gone down in the country and travelling anywhere in the country is not a risk factor. That apart, one of the witnesses has left Himachal Pradesh where he was living and travelled to the Tibetan Settlement in Bylakuppe, Mysore, Karnataka, where the number of Covid-19 cases was at the highest till recently. If such a circumstance did not restrain the witness from traveling there is no reason for him or the other witnesses not to come to Sikkim for the purpose of adducing evidence. Walking this Court through the Order of the Hon'ble Supreme Court dated 06-04-2020 in Suo Motu Writ (Civil) No.05 of 2020 (*In Re : Guidelines for Court Functioning through Video Conferencing During Covid-19 Pandemic*) it was contended that the Hon'ble Supreme Court specified *inter alia* that in no case shall evidence be recorded by VC without the "mutual

consent” of both the parties. That, the “Rules for Video Conferencing for Court, 2020”, notified by the High Court of Sikkim on 12-05-2021, duly published in the Sikkim Government Gazette No.102 dated 15-05-2020 (for short, “VC Rules, 2020”), at Rule 6 Clause 6.2 specifies that any proposal to move a request for video conferencing should be preceded by a discussion with the other party or parties to the proceeding, except where it is not possible or inappropriate. That, no such discussions took place between the parties. That apart, summons are to be issued to the witness who is to be examined through VC which has not been done nor are the Petitioners aware of it. The provisions of Rules 7, 8, 12 and Clauses 8.5, 10.2, 12.4 of the VC Rules, 2020, were also relied upon while urging that it was essential to have the witnesses physically present for their cross-examination. It was further contended that the witnesses speak only in the Tibetan language and the translation process is time consuming as it is difficult for the Advocates and the Learned Commissioner to understand the answers of the witnesses. That, this difficulty to a large extent can be mitigated by the physical presence of the witnesses and would also safeguard against prompting by any interested person. Besides, technical glitches cannot be ruled out. That, 6 (six) witnesses who were all senior citizens were physically present for their evidence in April, 2021 when the second wave of Covid-19 Pandemic was at its peak and the Learned Commissioner had effectively recorded their evidence duly complying with all Covid-19 protocols and this should have been duly considered by the Learned Trial Court. That, as the Learned Trial Court allowed the cross-examination of the 4 (four) witnesses of the Respondent



No.3 without the consent of the parties contrary to the orders of the Hon'ble Supreme Court and the Rules framed by this Court, the impugned Order deserves to be set aside and the physical presence of the witnesses ordered for their cross-examination.

3. Repudiating the submissions of Learned Counsel for the Petitioners, Learned Senior Counsel for the Respondent No.3 canvassed the contentions that the Respondent No.3 before the Learned Trial Court while seeking to examine his witnesses via VC had in accordance with the prescribed Rules and for propriety consulted the Counsel on record for the Plaintiffs (Petitioners herein). The Petitioners however indicated their insistence upon a direct, personal cross-examination of the witnesses. That, this is borne out by their response to the Petition of the Defendant No.3, before the Learned Trial Court wherein the circumstance of such a discussion was not denied by the Petitioners and it was specifically averred that the Petitioners had not consented to the examination of the witnesses through VC. That, Rule 6 Clause 6.2 of the VC Rules, 2020, no doubt requires that there has to be a discussion with the other party or parties before a proposal is moved to request for VC. However, Rule 6 Clause 6.3 lays down that the Court is the ultimate arbiter and should a request for VC be received, upon hearing the concerned persons the Court will exercise its discretion. Consequently, the Learned Trial Court after hearing the parties on the application moved by Learned Senior Counsel for the Respondent No.3 before it duly considered the Petition and allowed it. It was further urged that the Hon'ble Supreme Court in its Order has categorically laid down that "until appropriate Rules are framed by the High Court", VC shall be



mainly employed for hearing arguments whether at the trial stage or at the appellate stage. Pursuant thereto, the VC Rules, 2020 have been framed by this High Court on 12-05-2020 and are applicable to the present matter. That apart, the Supreme Court vide its Order dated 26-10-2020 in IA No.48252 of 2020 in *Suo Motu Writ (Civil) No.05 of 2020* has while substituting sub-para (vii) of Paragraph 6 of Order dated 06-04-2020 *supra*, held that the VC in every High Court and within the jurisdiction of every High Court shall be conducted according to the rules framed for that purpose by that High Court. Consequently, the VC Rules, 2020 now govern, Video Conferencing in all Courts within the jurisdiction of this High Court. That, no applicable Rules have been bypassed by the Respondent No.3 and consequent upon the refusal of the Learned Counsel for the Petitioners for VC, the Defendant No.3 invoked the provisions of Rule 6 Clause 6.2 of the VC Rules, 2020. Hence, the Order of the Learned Trial Court brooks no interference.

WP(C) No.45 of 2021

4. In WP(C) No.45 of 2021, the Petitioners assail the Order of the Learned District Judge dated 11-11-2021 in Title Suit No.01 of 2017 vide which the Learned Trial Court rejected an application filed by the Petitioners, under Section 151 of the Code of Civil Procedure, 1908, seeking to examine 15 (fifteen) local witnesses of the Defendant No.3 before the examination of his 4 (four) witnesses through VC. A second prayer related to rectification of the address of the witness of Defendant No.3, Respondent No.3 herein.

5. After hearing the Learned Counsel for the parties, the Learned Trial Court while allowing the second prayer *supra*, for the



first prayer observed that ordinarily it is for the concerned party to decide the order of production and examination of his witnesses. That, it is only in special circumstances that warrant the interference of the Court that the Court would exercise its discretion to direct the examination of the witnesses in a particular order and thereby rejected the prayer of the Petitioners.

6. Before this Court, it is urged by Learned Counsel for the Petitioner that should the said 15 (fifteen) witnesses be examined before the 4 (four) witnesses are cross-examined it would assist in expediting the trial.

7. Resisting this argument, Learned Senior Counsel for the Respondent No.3 relied on the ratio in ***Md. Sanjoy and Md. Mahtab vs. The State of West Bengal***¹ and ***Cagetan Rosaria Alveres vs. Hakul***², and put forth the contention that Section 135 of the Indian Evidence Act, 1872 (for short "the Evidence Act") lays down the law on the subject which entitles a party to present its witnesses for examination according to its discretion. That, the Court ought to be slow to interfere with this discretion of the party. Hence, this prayer of the Petitioner requires no consideration.

8. Having heard the Learned Counsel for the parties at length, I have also perused the Orders dated 06-04-2020 and 26-10-2020 of the Hon'ble Supreme Court in Suo Motu Writ (Civil) No.05 of 2020 as also the Rules for Video Conferencing for Courts, 2020, published in the Sikkim Government Gazette dated 15-05-2020 enforced from 03-06-2020 vide Notification No.87/HCS of the same date and the impugned Orders dated 21-07-2021 and 11-11-2021.

¹ 1999 SCC OnLine Cal 371 : (2000) 1 Cal LT 230

² 1957 0 Supreme (Raj) 28 : 1957 0 RLW(RJ) 126



9. Taking up the prayers made in WP(C) No.44 of 2021, from the submissions put forth before this Court and also on careful perusal of the Petitions filed before the Learned Trial Court by the Defendant No.3 in Title Suit No.01 of 2017 it is apparent that a discussion had indeed emanated between the Counsel for the Defendant No.3 and the Counsel for the Petitioners. This is fortified by the averments made in the Petition filed by the Defendant No.3 on 22-04-2021 before the Learned Trial Court which is reproduced hereinbelow;

"17. That in accordance with the prescribed rules, the Defendant No.3 had in all propriety consulted the counsel for the plaintiffs through his own counsel. However, the plaintiffs have indicated their insistence upon a direct, personal cross examination of the witnesses aforesaid putting not only the witness into peril but themselves as well. The petitioner respectfully submits that it is neither feasible nor fair to the said witnesses to be subjected to such a hazardous method of examination during the current pandemic."

In response, the Petitioners filed their reply dated 30-06-2021, the relevant portion of which is as follows;

"18. That in reply to paragraph 17 it is submitted that in view of the submission made in paragraphs 8 & 15 above, the plaintiffs would not consent for examination of witness through video conferencing."

10. Pursuant to this refusal, the Defendant No.3 has correctly taken refuge of the provision of Clause 6.3 of Rule 6 of the VC Rules, 2020 and the Court has correctly exercised its jurisdiction in considering the matter and passing the impugned Order. While examining the correctness of the Order of the Learned Trial Court it is necessary to notice that the Supreme Court in Suo Motu Writ (Civil) No.05 of 2020 dated 06-04-2020 ordered as follows;



"6.

- vii. Until appropriate rules are framed by the High Courts, video conferencing shall be mainly employed for hearing arguments whether at the trial stage or at the appellate stage. In no case shall evidence be recorded without the mutual consent of both the parties by video conferencing. If it is necessary to record evidence in a Court room the presiding officer shall ensure that appropriate distance is maintained between any two individuals in the Court.

....."

Vide its Order dated 26-10-2020, the Supreme Court was pleased to substitute sub-para (vii) of Paragraph 6 of the Order dated 06-04-2020 as follows;

".....

"We propose to substitute sub-para (vii) of Paragraph 6 with the following;

The Video Conferencing in every High Court and within the jurisdiction of every High Court shall be conducted according to the Rules for that purpose framed by that High Court. The Rules will govern Video conferencing in the High Court and in the district courts and shall cover appellate proceedings as well as trials.

....."

Thus, on the anvil of the Order extracted *supra*, we need not be concerned any further with the Orders of the Hon'ble Supreme Court on Video Conferencing considering that in the interregnum VC Rules, 2020, were notified by this High Court in compliance of the direction in the Orders *supra*.

11. This Court is aware that Notification bearing No.55/Judl./HCS and Circular bearing No.20/Confdl./HCS, both dated 28-10-2021, were issued whereby physical hearing in this Court and in the Subordinate Courts of Sikkim, respectively, resumed w.e.f. 15-11-2021, but at the same time it is relevant to notice that Covid-19 Pandemic is still prevalent although



undoubtedly the cases have abated considerably. This Court is also seized of the news that a new variant of the virus has emerged and precautions are being taken worldwide against it including in our country. The Learned Trial Courts and this High Court from April 2020 up to 14-11-2021 were consistently conducting matters through VC, minor glitches may not have allowed seamless proceedings yet we have successfully traversed through a variety of matters placed before us and dispensed justice. The Learned Trial Courts have also examined nth number of witnesses through VC. In the circumstances enunciated above, it would be regressive to speculate that the witnesses of the Respondent No.3 cannot be examined by VC and that their physical appearance is imperative to ensure fairness and resolve any issues that may arise during the recording of evidence. The language barrier and difficulties in translation will persist even if the witnesses physically appear because the Tibetan language is unknown and unfamiliar to the Counsel for the parties, this was indeed the specific reason why the Translators were required and have been appointed, it is no one's case that they have failed to execute the task that they have been entrusted with or that they have impeded justice in any manner.

12. Coming to the question of technical glitches, the Hon'ble Supreme Court in ***State of Maharashtra vs. Dr. Praful B. Desai***³ relied on by Learned Counsel for the Respondent No.3 has dealt in detail with VC and examining of witness by VC. Although it was pronounced years before the Covid-19 Pandemic struck and relates to a criminal matter, undoubtedly the principles thereof will

³ (2003) 4 SCC 602



also apply with equal vigour to a civil dispute. It is thus beneficial to extract the following paragraphs;

"19. At this stage we must deal with a submission made by Mr Sundaram. It was submitted that video-conferencing could not be allowed as the rights of an accused, under Article 21 of the Constitution of India, cannot be subjected to a procedure involving "virtual reality". Such an argument displays ignorance of the concept of virtual reality and also of video-conferencing. 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. To take an example, today one does not need to go to South Africa to watch World Cup matches. One can watch the game, live as it is going on, on one's TV. If a person is sitting in the stadium and watching the match, the match is being played in his sight/presence and he/she is in the presence of the players. When a person is sitting in his drawing room and watching the match on TV, it cannot be said that he is in the presence of the players but at the same time, in a broad sense, it can be said that the match is being played in his presence. Both, the person sitting in the stadium and the person in the drawing room, are watching what is actually happening as it is happening. This is not virtual reality, it is actual reality. One is actually seeing and hearing what is happening. Video-conferencing is an advancement in science and technology which permits one to see, hear and talk with someone far away, with the same facility and ease as if he is present before you i.e. in your presence. In fact he/she is present before you on a screen. Except for touching, one can see, hear and observe as if the party is in the same room. In video-conferencing both parties are in the presence of each other. The submissions of the respondents' counsel are akin to an argument that a person seeing through binoculars or telescope is not actually seeing what is happening. It is akin to submitting that a person seen through binoculars or telescope is not in the "presence" of the person observing. Thus it is clear that so long as the accused and/or his pleader are present when evidence is recorded by video-conferencing that evidence is being recorded in the "presence" of the accused and would thus fully meet the requirements of Section 273 of the Criminal Procedure Code. Recording of such evidence would be as per "procedure established by law".



20. Recording of evidence by video-conferencing also satisfies the object of providing, in Section 273, that evidence be recorded in the presence of the accused. The accused and his pleader can see the witness as clearly as if the witness was actually sitting before them. In fact the accused may be able to see the witness better than he may have been able to if he was sitting in the dock in a crowded courtroom. They can observe his or her demeanour. In fact the facility to playback would enable better observation of demeanour. They can hear and rehear the deposition of the witness. The accused would be able to instruct his pleader immediately and thus cross-examination of the witness is as effective, if not better. The facility of playback would give an added advantage whilst cross-examining the witness. The witness can be confronted with documents or other material or statement in the same manner as if he/she was in court. All these objects would be fully met when evidence is recorded by video-conferencing. Thus no prejudice, of whatsoever nature, is caused to the accused. Of course, as set out hereinafter, evidence by video-conferencing has to be on some conditions.”
[emphasis supplied]

13. In light of the above detailed discussions, in my considered opinion, nothing erroneous emanates in the assailed Order dated 21-07-2021 of the Learned Trial Court which is accordingly upheld.

14. So far as WP(C) No.45 of 2021 is concerned, Sections 135 and 138 of the Evidence Act provide as follows;

135. Order of production and examination of witnesses.—The order in which witnesses are produced and examined shall be regulated by the law and practice for the time being relating to civil and criminal procedure respectively, and, in the absence of any such law, by the discretion of the Court.

138. Order of examinations.—Witnesses shall be first examined-in-chief, then (if the adverse party so desires) cross-examined, then (if the party calling him so desires) re-examined.

15. Undoubtedly, if any exigency or circumstances so require the law provides that the Court shall exercise its discretion, otherwise it shall be for the party concerned to decide which witness he seeks to examine first and cannot be based on the dictates of the opposing party or for their convenience. In this



regard also I have to agree with the finding of the Learned Trial Court and hence the impugned Order dated 11-11-2021 warrants no interference.

16. Parties shall comply with the directions in the impugned Orders dated 21-07-2021 and 11-11-2021.

17. Resultant, WP(C) No.44 of 2021 and WP(C) No.45 of 2021 stand dismissed and disposed of accordingly. Pending application(s), if any, stand also disposed of.

(Justice Meenakshi Madan Rai)
Judge
03-12-2021

Approved for reporting : **Yes**