

ORDER

The captioned writ petition is filed by the defendant No.2 questioning the order dated 30.05.2022 passed on memo filed by the petitioner/defendant No.2. Under the impugned order, the learned Judge has declined permission sought by the counsel appearing for the present petitioner/defendant No.2 to be present at the remote point while recording evidence of defendant No.2.

2. The present petitioner is a resident of Michigan, USA and is aged about 87 years and is suffering from various health issues. Therefore, the petitioner filed applications in I.A.Nos.27 and 28 under Rule 6 of the Video Conferencing Rules and also application in I.A.No.36 under Order 18 Rule 16 of CPC to examine the petitioner immediately. The said applications were allowed by the Trial Court thereby permitting the present petitioner/defendant No.2 and defendant No.5 to record their evidence through Video Conference. The Trial Court accordingly with the consent of

parties to the suit, fixed the date of recording evidence through video conferencing on 06.06.2022. The petitioner filed memo on 25.05.2022 requesting the Court to make further e-mail correspondence towards logistic support and to inform the remote point coordinator to issue 5 entry passes to enable the petitioner to have assistance of his Advocate and also attendants.

3. The contesting defendants filed statement of objections to the said memo. The learned Judge vide impugned order at Annexure-A has refused to permit the petitioner's Advocate to be present at the remote point while recording evidence of defendant No.2. It is this order which is under challenge.

4. Learned counsel appearing for the petitioner reiterating the grounds has raised the following questions:

"1) Whether an advocate representing a party who has been tendered in evidence from a Remote

point can be excluded from the remote point at the time of recording evidence of the witness?

2) Whether a party to the proceedings could be excluded from personal presence at the remote point where evidence of a witness in the case is being recorded at the Remote Point?

3) What order or direction is required to be issued?"

5. Learned counsel would vehemently argue and contend that Advocate plays a vital role in dispensation of justice. Referring to the principles of the Hon'ble Apex Court in the case of ***Shrimati Jamilabai Abdul Kadar vs. Shankarlal Gulabchand and Others***¹, he would point out that the Hon'ble Apex Court while rendering the above said judgment was of the view that the lawyer appearing in the Court is a class by himself and to compare him with an ordinary agent may be to lose sight of the lawyer as engineer of the rule of law in society. Referring to the judgment, he would also point out that the observations made by the

¹ (1975) 2 SCC 609

Hon'ble Apex Court indicating that legal profession is a para-public institution which deserves special confidence of and owes greater responsibility to the community at large than the ordinary run of agency. He would further contend that casting aspersions on an Advocate is undesirable.

6. The second limb of arguments canvassed by the learned counsel for the petitioner is in regard to interpretation of provision of Video Conferencing Rules. Referring to the Rules, he would point out that said Rules do not specifically exclude the Advocate when evidence of witness is being recorded either at the Court point or at the remote point. Referring to Rule 2(iv) of the Rules, he would contend that the said definition is an inclusive definition and therefore, interpreting the above said Rule, learned counsel would contend that both physical and virtual court are presumed to be Court for all practical purposes. Therefore, referring to Rules 2(v) and 2(x) , he would contend that Court point and remote point together constitute a Court more particularly,

when evidence is being recorded through video conference. It is in this background, he would counter the defence of the contesting respondents that the remote point has to be treated as a witness box or as an arguing counsels desk or as a commissioners desk. Therefore, he would contend that such an argument is too narrow a construction. He would submit that if a coordinator is entitled to be present at the remote point and if such an argument is accepted, then it would clearly indicate that even coordinator is deemed to be present in the witness box and therefore, he would submit that such an argument would only lead to an absurd construction. Learned counsel would further contend that remote point is part of a Court and therefore, he would contend that court point is a virtual court for the persons present at the remote point.

7. To buttress his arguments, he has placed reliance on the decision rendered by the Delhi High Court in the case of ***Milano Impex Pvt. Ltd. vs. Egle Footwear Pvt. Ltd. and***

Ors.² and has also referred to the judgment rendered by the Andhra Pradesh High Court in the case of **Sirangai Shoba @ Shoba Munnuri vs. Sirangi Muralidhar Rao**³. Referring to these two judgments, he would contend that the Delhi High Court and Andhra Pradesh High Court have permitted the counsel to be present at the time of video conferencing at the remote point with the witness. Referring to the above two judgments, he would further contend that Advocate being an officer of the Court is entitled to be present at court point and remote point and it is his prerogative right and the same cannot be deprived. He would further contend that apprehension of defendants that the presence of Advocate, at the time of recording of evidence; there is possibility of witness being hoaxed or assisted to tackle the questions that would be posed in cross-examination is unfounded.

8. Referring to Entry 9 of Schedule -I of the Rule, he would bring to the notice of this Court that all the participants

² 2011 (124) DRJ 668

³ AIR 2017 Hyd 88

are required to look into the camera and in terms of Rule 8.9 of the Video Conferencing Rules, the Court is better placed to record the demeanor of the person being examined and sufficient safeguards are provided under Rule 8.6 of the said Rules. Therefore, the question of prompting, tutoring, etc., are taken care of under the said Rules. He would further submit that Rule 2.12 which defines 'required person' has been given an inclusive definition to include an Advocate or a party-in-person who intends to examine the witness. Referring to Order 18 Rules 10 and 11 of CPC, he would point out that an Advocate is required to be present at the time of examination-in-chief as well as cross-examination. Therefore, he would contend that his presence is absolutely necessary. On these set of grounds, he would contend that the impugned order under challenge is not at all sustainable as the learned Judge has erroneously applied Rule 8.11.

9. Learned counsel would strenuously argue and contend that Rule 8.11 does not apply to a party or duly

authorised Advocate and therefore, would contend that learned Judge has apparently misconstrued the statutory rules and therefore, the impugned order has virtually taken away the right of the petitioner to have effective counseling at the time of recording evidence and therefore, he would contend that denying permission to the counsel on record to be present along with defendant No.2 infringes the constitutional right to have access to justice. He would conclude his arguments by contending that the respondents' conduct is grossly unfair and the same has caused the petitioner huge expenditure as he had already made arrangements for recording evidence through video conferencing.

10. Per contra, learned counsel appearing for the respondent No.14 supporting the reasons assigned by the learned Judge would, however, counter the arguments addressed by the learned counsel appearing for the petitioner. He would contend that the remote point has to be, for all practical purposes, assumed as a witness box and therefore,

the counsel appearing for the present petitioner cannot be permitted to be present in the witness box along with the witness. Emphasizing the object of court point and remote point, he would contend that the Rules framed therein to record evidence through video conferencing requires transparency and fairness and therefore, it is not permissible for a witness to be accompanied by an Advocate. He would counter the claim made by the petitioner that counsel for the witness during cross-examination cannot seek physical presence within the witness box and no satisfactory explanation is forthcoming as to why petitioner is insisting to have assistance of his counsel at the remote point. He would seriously object the presence of counsel for defendant No.2 on the premise that he is the foster son and therefore, is an interested party.

11. Taking this Court through Rule 8.11 read with Rule 8.16, he would submit that it is only the coordinator who is entitled to be present in the room and therefore, he would

contend that an Advocate cannot accompany the witness inside the remote point especially during recording of evidence.

12. Learned counsel appearing for the respondent No.8 arguing in the same vein, has serious objections in permitting the counsel appearing for defendant No.2 to be physically present at the remote point. Adopting the arguments of learned counsel for respondent No.14, he has placed reliance on the following judgments:

1) *State of Maharashtra vs. Dr.Praful B.Desai* - (2003) 4 SCC 601;

2) *Twentieth Century Fox Film Corporation and Another vs. NRI Film Production Associates (P) Ltd.*, - ILR 2003 Kar 789;

3) *Sujoy Mitra vs. State of West Bengal* - (2015) 16 SCC 615.

13. Heard Shri Rajeswara P.N., learned counsel for the petitioner, Shri Sunil S.Rao, learned counsel for respondent

No.8 and Shri Girish Kumar, learned counsel for respondent No.14. Perused the order under challenge.

14. Before I advert to the controversy involved between the parties, it would be useful for this Court to refer to the relevant Rules framed by this Court which is titled as "Rules for Video Conferencing for Courts". The relevant definitions are culled out as under:

"2(v) **'Court Point'** means the Courtroom or one or more places where the Court is physically convened, or the place where a Commissioner or an inquiring officer holds proceedings pursuant to the directions of the Court.

2(x) **'Remote Point'** is a place where any person or persons are required to be present or appear through a video link.

2(xii) **'Required Person'** includes:

- a. the person who is to be examined; or
- b. the person in whose presence certain proceedings are to be recorded or conducted; or
- c. an advocate or a party in person who intends to examine a witness; or

- d. any person who is required to make submission before the Court; or*
- e. any other person who is permitted by the Court to appear through video conferencing."*

15. The primary objection raised by the respondents before the Court below is that except coordinator, no other person is allowed to be present at the remote point. Therefore, respondents are relying on Rule 8.11 of the said Rules. It would be also useful to refer to Rules 8.11 and 8.16 which reads as under:

"8.11 The Coordinator at the Remote Point shall ensure that no person is present at the Remote Point, save and except the person being examined and those whose presence is deemed administratively necessary by the Coordinator for the proceedings to continue.

8.16 Subject to such orders as the Court may pass, in case any party or person authorized by the party is desirous of being physically present at the Remote Point at the time of recording of the testimony, such a party shall make its own arrangement for appearance/representation at the Remote Point."

16. Learned counsel appearing for the contesting respondents by placing reliance on Rule 8.11, would seriously object the presence of counsel appearing for the present petitioner/defendant No.2. Learned counsel appearing for the respondents would vehemently argue and contend that remote point is a place where any person/s required to be present or appear through a video link would not mean a Court point which is physically convened to hold court proceedings. Learned counsel for the respondents would also place reliance on definition of "Required Person" under Rule 2(xii). Referring to the definition of "Required Person", both counsel would vehemently argue and contend that "Required Person" would in no way include a counsel of a party who is supposed to be cross-examined. Referring to Rule 2(xii)(c), learned counsel Shri Sunil S.Rao, would contend that it is only an Advocate or a party-in-person who intends to examine a witness can be permitted to be present at the remote point and not the counsel of a party who is supposed to be cross-examined.

Therefore, the respondents have strongly resisted in granting permission to the counsel on record appearing for the petitioner herein to be present at the remote point.

17. Interpreting the definition of "Required Person", it is argued and contended that "Required Person" would be a person whose presence is indispensable for the purpose of conducting or recording a proceeding. They would further contend that other than the witness who is required to be examined through video conferencing, Rule 5.9 provides and authorizes a Court to direct the coordinator at the remote point to provide a translator or an expert in sign language. Therefore, it is contended that the words "Required Person" has to be read conjointly with Rule 5.9 of the said Rules and on account of conjoint reading of "Required Person" along with Rule 5.9, it is argued that the required person in no way includes the counsel on record appearing for a party who has to offer for cross-examination.

18. In the written synopsis, learned counsel appearing for the respondent No.8 has furnished a tabular column. Referring to Rule 5.6.3, learned counsel for respondent No.8 has raised an issue that no authorized person can be permitted to enter the Video conference room. The contesting respondents have also placed reliance on Rule 5.6.4 which clearly contemplates that a person being examined shall not be prompted, tutored, coaxed, induced or coerced in any manner.

19. The learned Judge has partly rejected the memo permitting the counsel appearing for the petitioner to join the recording of evidence by way of a link. The learned Judge has permitted the counsel appearing for the present petitioner to conduct examination through video conferencing and has declined to grant permission to the counsel to be physically present at the remote point.

20. The COVID-19 pandemic has in fact disrupted the court operations across the country which prompted the Courts to postpone non-essential proceedings. It is in this background, the Courts begun contemplating use of remote technology. Under compelling situation, remote technology has been a vital tool for courts in the midst of public health crisis. But the use of remote technology and its possible expansion has also raised critical questions about litigants' rights and their access to justice and its impact, either positively or negatively. Of course there are conflicting opinions and some experts have expressed their opinion that live testimonies, due to face-to-face immediacy, are perceived as more vivid than video-based testimonies. It is in this background, Rules are framed as Courts expressed a view that there cannot be plausible objection for adopting the technology and if a witness or a party requests that evidence of a witness may be recorded through video conferencing, the Courts should be liberal in granting such a prayer. These

Rules are framed by this Court, in all probability, to counter the increasingly crowded dockets pending before the various Courts.

21. The respondents are objecting the presence of counsel at the remote point. The moot question that has to be examined before this Court is, as to whether the Court is vested with discretion to permit the counsel on record to be present at the remote point along with his client?

22. Rule 14 refers to 'Conduct of proceedings'. It would be useful for this Court to refer to Rules 14.1 and 14.7 which reads as under:

"14.1 All Advocates, Required Persons, the party in person and/or any other person permitted by the Court to remain physically or virtually present (hereinafter collectively referred to as participants) shall abide by the requirements set out in Schedule I.

14.7 The Court shall satisfy itself that the Advocate, Required Person or any other participant that the Court deems necessary at the Remote Point

or the Court Point can be seen and heard clearly and can clearly see and hear the Court."

23. On perusal of Rule 14.1, it is clearly evident that the said Rule clearly contemplates and enables all Advocates, required persons, party-in-person either to remain physically or virtually present who are collectively referred to as participants. The only rider to the said sub-rule is that the participants are required to abide by the requirement set out in Schedule-I to the Rules. Therefore, the "Required Person" as defined under Rule 2(xii) would not necessarily mean that it is only the witness, who has to be examined, has to be physically present at the remote point. This Court is unable to understand as to how the counsel on record can be denied a right of audience at the remote point. Rule 14 clearly contemplates and permits all Advocates including required persons or party-in-person to be physically present at the remote point. Further, Rule 14.7 also gives discretion to the Court in a given case to permit the Advocate or any other

participants that Court deems necessary at the remote point or Court point.

24. The definition "Required Person" and further persons who can be permitted to be present at the remote point as contemplated under Rule 8.11 cannot be so narrowly construed and interpreted so as to exclude a counsel. If such a proposition is accepted, that would take away the valuable rights of a client who is entitled for apt assistance by his counsel on record. It is an established tradition that a trusting relationship between a client and Advocate is necessary for effective representation. Therefore, legal assistance before a witness is examined or cross-examined plays a vital role. The counsel appearing for either of the parties are the most important actors of most court room interactions. The Advocates on record are the central influence in the court room. Therefore, personal contact between a counsel and his client stand together in Court and therefore, is deemed very important in establishing trust which would ultimately result in

establishing a litigants' faith in the legal system overall and this trust is often built by the Advocates on record who are also officers of the Court. Mere presence of Counsel of a deponent under cross-examination at remote point would result in either prompting or tutoring the witness.

25. The definition "Required Person" under Rule 2(xii) coupled with Rule 8.11 authorizing a coordinator at the remote point to ensure that no person is present at the remote point cannot be read in isolation. The above said relevant rules have to be conjointly read along with Rules 14.1 and 14.7. A witness is entitled for legal assistance even when he is cross-examined. However, at the time of cross-examination, his counsel cannot prompt or tutor him. Based on mere apprehension, the above said rules cannot be narrowly interpreted so as to exclude the counsel on record who is an integral part of legal system and plays a vital role in dispensation of justice. The Advocates admittedly play a role as an Officer of the Court. His presence at the time of cross-

examination of his witness is further more essential. It is a common fact that cross-examination often involves a battle of wits between cross-examiner and witness. At times, Advocates cross-examining the witness may have to use guile to expose the unreliability of the witness, as when the latter is lulled into a false sense of security and does not realise that he is being trapped or set up for questions which will effectively challenge him. Advocates often adopt such an approach which are essential to break the effect created by the witness in examination-in-chief or in his affidavit of the evidence in chief. Therefore, it is the counsel appearing for the witness who is subjected to cross-examination can object to the questions posed to the witness which are found to be contrary to ethical rules. In such circumstances, it is the Advocate who has to meticulously watch the proceedings of cross-examination and has to be vigilant to see that Advocate who is cross-examining does not lie or put untruths to the witness. The essence of the principle here is that the cross-

examiner must not act dishonestly. He must not mislead the Court as well as the witness who is being cross-examined. Therefore, the presence of Advocate also plays a vital role when his witness is being cross-examined at the remote point. The presence of Advocate at the remote point would create a sense of security and would help him to face test of cross-examination. That cannot be misconstrued to such an extent that it would amount to prompting or tutoring. His mere presence at the remote point will not violate the Rules.

26. Therefore, in the present case on hand, defendant No.2 is entitled to seek legal assistance even when he is being cross-examined by way of video conferencing. Using video conferencing, the defendant's rights cannot be sacrificed in the name of procedural efficiency. The adversarial model which is adopted for several decades cannot be abandoned under the garb that the Rules relating to video conferencing does not permit. Adversarialism is a cornerstone of the legal process; the system is predicated on this tenet. Denial of legal

assistance while recording ocular evidence of a witness through video conferencing violates fundamental fairness.

27. Looking to the recent trend, video conferencing does have a place in the legal system. The challenge is not to exclude it but to use it responsibly. The video conferencing can produce better results, but at the same time, certain highlighted issues which may prop up down the line have to be addressed effectively. The client is entitled to seek assistance and therefore, the clients interaction with his counsel on record is quite essential to a fair trial and a person who is supposed to be cross-examined is entitled to meet his counsel ahead of time to discuss every anticipated questions, concept or a piece of evidence. The Rules that are framed by this Court governing recording of evidence through video conferencing require all participants to follow the Rules in terms of Schedule-I which is annexed to the Rules.

28. It is in this background, the proposition floated by the counsel appearing for the contesting respondents cannot be acceded to. An Advocate should always be with his client. The Rules framed by this Court do not intend to support plaintiffs team or a defence team. The counsel appearing for respective clients are entitled to stand together and the same is necessary for an attorney-client relationship to function properly. A medium that interferes with the court's main mission should be eliminated.

29. The contesting parties are entitled to have a discussion with their Advocates on record as they need to discuss important decisions concerning vital documents, basic legal strategy prior to appearing in Court. Personal meetings are better for hastening out case strategies, fact gatherings and basic legal tactics. Therefore, it is in this context, if the proposition of respondents is accepted and if counsel appearing for a witness who is supposed to be cross-examined is denied a right of audience at a remote point, the

apprehension that the ocular evidence recorded through video conferencing will not satisfy the prescribed requirements of a fair trial and the same would create a doubt in regard to legitimacy of a legal process may turn out to be a hard reality. Therefore, denial of right of audience to a counsel on record has its own ramifications and may result in violation of fundamental fairness and may also have impact on due process of law.

30. By introducing technology and by bringing in recording of ocular evidence through video conferencing, an attempt is made in all good faith to meet the standards of face-to-face trial. By bringing in new Rules, the Courts have to meet the established standards and traditions in recording evidence physically in the open Court. The dignity and ritual of physical presence in the Court was found to be absolutely necessary for public perception of justice. A very ceremony of trial and presence of fact finder may exert a powerful force for truth telling. The opportunity to judge the demeanor of a

witness face-to-face is accorded great value in our tradition. Now in a given case, where parties consent to record ocular evidence through video conferencing has to meet the above said standards. There is an apprehension that non-verbal cues are unavailable or harder to read when associated with video conferencing. Therefore, the presence of counsel of a witness to be cross-examined at a remote point becomes further more essential.

31. In the light of the discussions made supra, now let me see whether the Court is vested with discretion to permit the counsel appearing for a witness who is supposed to be cross-examined to be present at the remote point. The remote point has to be considered as an extended court room. A Court includes a physical court and a virtual court and if a Court can have court point at one or more place, then the Rules clearly prescribe that the counsel on record can be present at all point either in the Court physically or through a video link or at a remote point physically. Rule 14.1 clearly

contemplates persons who are entitled to participate in court proceedings. Rule 14.1 clearly indicates that all Advocates and required persons are entitled to remain physically or virtually present. A discretion is also vested with the Court under Rule 14.7 and it is well within the discretion of the Court in a given set of facts to permit Advocate, required person or any other participants that court deems necessary at the remote point or at the court point. If at all any mischief is played during the course of recording evidence, the Court is better placed to hold an enquiry in regard to any mischief that would be complained.

32. Unlike face-to-face hearing, a Judge has a privilege of replaying the recording and find out as to whether the witness is hoaxed or tutored. The court can also examine whether counsel on record has interfered and assisted the witness under cross-examination. The guidelines set out in Schedule-I coupled with Rule 5.6.4 clearly provides adequate protection. It is in this background, this Court would find that

the apprehension of the respondents and objections raised in regard to entitlement of counsel on record to be physically present at remote point appears to be misconceived.

33. If the order under challenge is tested in the light of the above said discussions made supra, this Court is of the view that the order under challenge is not at all sustainable. Mere bald allegations that if the counsel is permitted to be physically present at remote point, then every possibility of petitioner getting prompted, tutored or coaxed cannot be acceded to and such an objection is not at all sustainable. In fact, Rule 14 which lays down guidelines for conducting proceedings through video conferencing clearly contemplates and authorizes all Advocates to be present physically at remote point. A discretion is also vested with the Court in a given set of facts to permit the counsel or any other unconnected participants to be physically present at the remote point. It is in this background, this Court would find that the learned Judge erred in not exercising discretion

judiciously. Therefore, the finding of the learned Judge that counsel appearing for the present petitioner/defendant No.2 is already present at the remote point and he can join recording of evidence by joining the link does not satisfy the requirements of a fair trial. The learned Judge erred in not exercising judicial discretion by permitting the counsel appearing for defendant No.2 to be physically present at the remote point.

34. If a coordinator at the remote point is already available and if the entire ocular evidence is video recorded, any slight mischief can be easily taken notice of and the consequences would follow if the counsel contravenes any of the courtesies and protocols applicable to a physical Court. Therefore, I am of the view that the counsel appearing for the defendant No.2 is entitled to be physically present at the remote point.

35. For the reasons stated, supra, I pass the following:

ORDER

(i) The writ petition is allowed;

(ii) The impugned order dated 30.05.2022 passed in O.S.No.66/2016 on the file of the III Additional City Civil & Sessions Judge, Bengaluru is set aside. Consequently, the memo dated 25.05.2022 filed by the petitioner/defendant No.2 is allowed;

(iii) The coordinator at the remote point shall ensure that while recording evidence of the petitioner/defendant No.2, the persons who are permitted to be present at the remote point will not indulge in interfering with his cross-examination;

(iv) Before commencing with the recording of evidence of petitioner/defendant No.2, the Court shall satisfy itself that the counsel appearing on behalf of petitioner/defendant No.2 can be seen and heard clearly at the remote point;

(v) The Court shall also monitor and take all necessary precautions that recording of ocular evidence of petitioner/defendant No.2 is conducted by strictly following the Rules.

Sd/-
JUDGE

CA