CASE NO.:
Appeal (crl.) 476 of 2003
Appeal (crl.) 477 of 2003

PETITIONER:
The State of Maharashtra
P. C. Singhi

RESPONDENT:
Dr. Praful B. Desai
Dr. Praful B. Desai and another

DATE OF JUDGMENT: 01/04/2003

BENCH:
S.N. Variava & B.N. Agrawal

JUDGMENT:

J U D G M E N T

(Arising out of SLP (Crl.) No. 6814 of 2001)

(Arising out of SLP (Crl.) No. 6815 of 2001)

Variava, J.

1. Leave granted

2. Heard parties

3. These Appeals are against a Judgment of the Bombay High Court dated 23rd/24th April 2001. The question for consideration is whether in a criminal trial, evidence can be recorded by video conferencing. The High Court has held, on an interpretation of Section 273, Criminal Procedure Code, that it cannot be done. Criminal Appeal (arising out of SLP (Criminal) No 6814 of 2001) is filed by the State of Maharashtra. Criminal Appeal (arising out of SLP (Criminal) No 6815 of 2001) is filed by Mr. P. C. Singhi, who was the complainant. As the question of law is common in both these Appeals, they are being disposed of by this common Judgment. In this Judgment parties will be referred to in their capacity in the Criminal Appeal (arising out of SLP (Criminal) No 6814 of 2001). Mr. P. C. Singhi will be referred to as the complainant.

4. Briefly stated the facts are as follows:

The complainant's wife was suffering from terminal cancer. It is the case of the prosecution that the complainant's wife was examined by Dr. Ernest Greenberg of Sloan Kettering Memorial Hospital, New York, USA, who opined that she was inoperable and should be treated only with medication. Thereafter the complainant and his wife consulted the Respondent, who is a consulting surgeon practising for the last 40 years. In spite of being made aware of Dr Greenberg's opinion the Respondent suggested surgery to remove the uterus. It is the case of the prosecution that the complainant and his wife agreed to the operation on the condition that it would be performed by the Respondent. It is the case of the prosecution that on 22nd December 1987 one Dr. A. K. Mukherjee operated on the complainant's wife. It is the case of the prosecution that when the stomach was opened ascetic fluids oozed out of the abdomen. It is the case of the prosecution that Dr. A. K. Mukherjee contacted the Respondent who advised closing up the stomach. It is the case of the prosecution that Dr. A. K. Mukherjee accordingly closed the stomach and this resulted in intestinal

fistula. It is the case of the prosecution that whenever the complainant's wife ate or drank the same would come out of the wound. It is the case of the prosecution that the complainant's wife required 20/25 dressings a day for more than 3 1/2 months in the hospital and thereafter till her death. It is the case of the prosecution that the complainant's wife suffered terrible physical torture and mental agony. It is the case of the prosecution that the Respondent did not once examine the complainant's wife after the operation. It is the case of the prosecution that the Respondent claimed that the complainant's wife was not his patient. It is the case of the prosecution that the bill sent by the Bombay Hospital belied the Respondent case that the complainant's wife was not his patient. The bill sent by the Bombay Hospital showed the fees charged by the Respondent. It is the case of the prosecution that the Maharashtra Medical Council has, in an inquiry, held the Respondent guilty of negligence and strictly warned him.

5. On a complaint by the complainant a case under Section 338 read with Sections 109 and 114 of the Indian Penal Code was registered against the Respondent and Dr. A. K. Mukherjee. Process was issued by the Metropolitan Magistrate, 23rd Court, Esplanade, Mumbai. The Respondent challenged the issue of process and carried the challenge right up to this Court. The Special Leave Petitions filed by the Respondent was dismissed by this Court on 8th July 1996. This Court directed the Respondent to face trial. We are told that evidence of six witnesses, including that of the complainant and the investigating officer, has been recorded.

6. On 29th June 1998 the prosecution made an application to examine Dr. Greenberg through video-conferencing. The trial court allowed that application on 16th August 1999. The Respondent challenged that order in the High Court. The High Court has by the impugned order allowed the Criminal Application filed by the Respondent. Hence these two Appeals.

7. At this stage it is appropriate to mention that Dr. Greenberg has expressed his willingness to give evidence, but has refused to come to India for that purpose. It is an admitted position that, in the Criminal Procedure Code there is no provision by which Dr. Greenberg can be compelled to come to India to give evidence. Before us a passing statement was made that the Respondent did not admit that the evidence of Dr. Greenberg was relevant or essential. However, on above-mentioned facts, it prima-facie appears to us that the evidence of Dr. Greenberg would be relevant and essential to the case of the prosecution.

8. Ms. Jaisingh, senior counsel argued for the State of Maharashtra. The complainant, except for pointing out a few facts, adopted her arguments. On behalf of the Respondent submissions were made by Senior Counsels Mr Sundaram and Mr Ashok Desai.

9. It was submitted on behalf of the Respondents, that the procedure governing a criminal trial is crucial to the basic right of the Accused under Articles 14 and 21 of the Constitution of India. It was submitted that the procedure for trial of a criminal case is expressly laid down, in India, in the Code of Criminal Procedure. It was submitted that the Code of Criminal Procedure lays down specific and express provisions governing the procedure to be followed in a criminal trial. It was submitted that the procedure laid down in the Code of Criminal Procedure was the "procedure established by law". It was submitted that the Legislature alone had the power to change the procedure by enacting a law amending it, and that when the procedure was so changed, that became "the procedure established by law". It was submitted that any departure from the procedure laid down by law would be contrary to Article 21. In support of this submission reliance was placed on the cases of A. K. Gopalan versus State of Madras reported in AIR 1950 S. C. 27, Nazir Ahmed versus Emperor reported in AIR 1936 Privy Council 253 and Siva Kumar Chadda versus Municipal Corporation of Delhi reported in AIR 1975 S.C. 915. There can be no dispute with these propositions. However if the existing provisions of the Criminal Procedure Code permit recording of evidence by video conferencing then it could not

be said that "procedure established by law" has not been followed.

10. This Court was taken through various sections of the Criminal Procedure Code. Emphasis was laid on Section 273, Criminal Procedure Code. It was submitted that Section 273, Criminal Procedure Code does not provide for the taking of evidence by video conferencing. Emphasis was laid on the words "Except as otherwise provided" in Section 273 and it was submitted that unless there is an express provision to the contrary, the procedure laid down in Section 273 has to be followed as it is mandatory. It was submitted that Section 273 mandates that evidence "shall be taken in the presence of the accused". It is submitted that the only exceptions, which come within the ambit of the words "except as otherwise provided" are Sections 284 to 290 (those dealing with issue of Commissions); Section 295 (affidavit in proof of conduct of public servant) and Section 296 (evidence of formal character on affidavit). It is submitted that the term "presence" in Section 273 must be interpreted to mean physical presence in flesh and blood in open Court. It was submitted that the only instances in which evidence may be taken in the absence of the Accused, under the Criminal Procedure Code are Sections 317 (provision for inquiries and trial being held in the absence of accused in certain cases) and 299 (record of evidence in the absence of the accused). It was submitted that as Section 273 is mandatory, the Section is required to be interpreted strictly. It was submitted that Section 273 must be given its contemporary meaning (Contemporanea exposition est optima et fortissimm - The contemporaneous exposition is the best and the strongest in law). It was submitted that video conferencing was not known and did not exist when the Criminal Procedure Code was enacted/amended. It was submitted that presence on a screen and recording of evidence by video conferencing was not contemplated by the Parliament at the time of drafting/amending the Criminal Procedure Code. It was submitted that when the Legislature intended to permit video conferencing, it has expressly provided for it, as is evident from the Ordinance passed by the State of Andhra Pradesh in December 2000 permitting the use of video conferencing under Sec. 167(2) Criminal Procedure Code in remand applications. It is pointed out that a similar amendment is being considered in Maharashtra. It is submitted that Section 273 is analogous to the Confrontation Clause set out in the VIth Amendment to the US Constitution. It is submitted that Courts in USA have held that video conferencing does not satisfy the requirements of the Confrontation Clause.

11. This argument found favour with the High Court. The High Court has relied on judgments of various High Courts which have held that Section 273 is mandatory and that evidence must be recorded in the presence of the accused. To this extant no fault can be found with the Judgment of the High Court. The High Court has then considered what Courts in foreign countries, including Courts in USA, have done. The High Court then based its decision on the meaning of the term "presence" in various dictionaries and held that the term "presence" in Section 273 means actual physical presence in Court. We are unable to agree with this. We have to consider whether evidence can be led by way of video-conferencing on the provisions of the Criminal Procedure Code and the Indian Evidence Act. Therefore, what view has been taken by Courts in other countries is irrelevant. However, it may only be mentioned that the Supreme Court of USA, in the case of Maryland vs. Santra Aun Craig [497 US 836], has held that recording of evidence by video-conferencing was not a violation of the Sixth Amendment (Confrontation Clause).

12. Considering the question on the basis of Criminal Procedure Code, we are of the view that the High Court has failed to read Section 273 properly. One does not have to consider dictionary meanings when a plain reading of the provision brings out what was intended. Section 273 reads as follows:

"Section 273: Evidence to be taken in presence of accused.
Except as otherwise expressly provided, all evidence taken in the course of the trial or other proceeding shall be taken in the

presence of the accused, or, when his personal attendance is dispensed with, in the presence of his pleader.
Explanation : In this section, "accused" includes a person in relation to whom any proceeding under Chapter VIII has been commenced under this Code.

Thus Section 273 provides for dispensation from personal attendance. In such cases evidence can be recorded in the presence of the pleader. The presence of the pleader is thus deemed to be presence of the Accused. Thus Section 273 contemplates constructive presence. This shows that actual physical presence is not a must. This indicates that the term "presence", as used in this Section, is not used in the sense of actual physical presence. A plain reading of Section 273 does not support the restrictive meaning sought to be placed by the Respondent on the word "presence". One must also take note of the definition of the term 'Evidence' as defined in the Indian Evidence Act. Section 3 of the Indian Evidence Act reads as follows:

"Evidence----Evidence means and includes------

(1) all statements which the Court permits or requires to be made before it by witnesses, in relation to matters of fact under inquiry;
such statements are called oral evidence

(2) all documents including electronic records produced for the inspection of the Court;
such documents are called documentary evidence"

Thus evidence can be both oral and documentary and electronic records can be produced as evidence. This means that evidence, even in criminal matters, can also be by way of electronic records. This would include video-conferencing.

13. One needs to set out the approach which a Court must adopt in deciding such questions. It must be remembered that the first duty of the Court is to do justice. As has been held by this Court in the case of Sri Krishna Gobe versus State of Maharashtra [(1973) 4 SCC 23] Courts must endeavour to find the truth. It has been held that there would be failure of justice not only by an unjust conviction but also by acquittal of the guilty for unjustified failure to produce available evidence. Of course the rights of the Accused have to be kept in mind and safeguarded, but they should not be over emphasized to the extent of forgetting that the victims also have rights.

14. It must also be remembered that the Criminal Procedure Code is an ongoing statute. The principles of interpreting an ongoing statute have been very succinctly set out by the leading jurist Francis Bennion in his commentaries titled "Statutory Interpretation", 2nd Edition page 617:

"It is presumed the Parliament intends the Court to apply to an ongoing Act a construction that continuously updates its wordings to allow for changes since the Act was initially framed. While it remains law, it has to be treated as always speaking. This means that in its application on any day, the language of the Act though necessarily embedded in its own time, is nevertheless to be construed in accordance with the need to treat it as a current law.

.....

In construing an ongoing Act, the interpreter is to presume that Parliament intended the Act to be applied at any future time in such a way as to give effect to the original intention. Accordingly, the interpreter is to make allowances for any relevant changes that have occurred since the Act's passing, in

law, in social conditions, technology, the meaning of words and other matters.. That today's construction involves the supposition that Parliament was catering long ago for a state of affairs that did not then exist is no argument against that construction. Parliament, in the wording of an enactment, is expected to anticipate temporal developments. The drafter will foresee the future and allow for it in the wording.
.
An enactment of former days is thus to be read today, in the light of dynamic processing received over the years, with such modification of the current meaning of its language as will now give effect to the original legislative intention. The reality and effect of dynamic processing provides the gradual adjustment. It is constituted by judicial interpretation, year in and year out. It also comprises processing by executive officials. "

15. At this stage the words of Justice Bhagwati in the case of National Textile Workers' Union v. P.R. Ramakrishnan, (1983) 1 SCC 228, at page 256, need to be set out. They are:

"We cannot allow the dead hand of the past to stifle the growth of the living present. Law cannot stand still; it must change with the changing social concepts and values. If the bark that protects the tree fails to grow and expand along with the tree, it will either choke the tree or if it is a living tree, it will shed that bark and grow a new living bark for itself. Similarly, if the law fails to respond to the needs of changing society, then either it will stifle the growth of the society and choke its progress or if the society is vigorous enough, it will cast away the law which stands in the way of its growth. Law must therefore constantly be on the move adapting itself to the fast changing society and not lag behind."

16. This Court has approved the principle of updating construction, as enunciated by Francis Bennion, in a number of decisions. These principles were quoted with approval in the case of Commissioner of Income Tax, Bombay versus M/s Podar Cement Pvt. Ltd. [(1997) 5 SCC 482]. They were also cited with approval in the case of State versus S. J. Chowdhury [(1996) 2 SCC 428]. In this case it was held that the Evidence Act was an ongoing Act and the word "handwriting" in Section 45 of that Act was construed to include "typewriting". These principles were also applied in the case of SIL Import USA versus Exim Aides Silk Exporters [(1999) 4 SCC 567]. In this case the words "notice in writing", in Section 138 of the Negotiable Instruments Act, were construed to include a notice by fax. On the same principle Courts have interpreted, over a period of time, various terms and phrases. To take only a few examples:- "stage carriage" has been interpreted to include "electric tramcar"; "steam tricycle" to include "locomotive"; "telegraph" to include "telephone"; "bankers books" to include "microfilm"; "to take note" to include "use of tape recorder"; "documents" to include "computer database's".

17. These principles have also been applied by this Court whilst considering an analogous provision of the Criminal Procedure Code. In the case of Basavaraj R. Patil v. State of Karnataka [(2000) 8 SCC 740] the question was whether an Accused needs to be physically present in Court to answer the questions put to him by Court whilst recording his statement under Section 313. To be remembered that under Section 313 the words are "for the purpose of enabling the accused personally to explain" (emphasis supplied). The term "personally" if given a strict and restrictive interpretation would mean that the Accused had to be physically present in Court. In fact the minority Judgment in this case so holds. It has however been held by the majority that the Section had to be considered in the light of the revolutionary changes in technology of communication and

transmission and the marked improvement in facilities for legal aid in the country. It was held, by the majority, that it was not necessary that in all cases the Accused must answer by personally remaining present in Court.

18. Thus the law is well settled. The doctrine "Contemporanea exposition est optima et fortissimm" has no application when interpreting a provision of an on-going statute/act like the Criminal Procedure Code.

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 exists. 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 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 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 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 presence of each other. The submissions of 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, Criminal Procedure Code. Recording of such evidence would be as per "procedure established by law".

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 Court room. They can observe his or her demeanour. In fact the facility to play back 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 play back 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.

Reliance was then placed on Sections 274 and 275 of the Criminal Procedure Code which require that evidence be taken down in writing by the Magistrate himself or by his dictation in open Court. It was submitted that video conferencing would have to take place in the studio of VSNL. It was submitted that that this would violate the right of the Accused to have the evidence recorded by the Magistrate or under his dictation in open Court. The advancement of science and technology is such that now it is possible to set up video conferencing equipment in the Court itself. In that case evidence would be recorded by the Magistrate or under his dictation in open Court. If that is done then the requirements of these Sections would be fully met. To this method there is however a draw back. As the witness is now in Court there may be difficulties if he commits contempt of Court or perjures himself and it is immediately noticed that he has perjured himself. Therefore as a matter of prudence evidence by video-conferencing in open Court should be only if the witness is in a country which has an extradition treaty with India and under whose laws contempt of Court and perjury are also punishable.

20. However even if the equipment cannot be set up in Court the Criminal Procedure Code contains provisions for examination of witnesses on commissions. Sections 284 to 289 deal with examination of witnesses on commissions. For our purposes Sections 284 and 285 are relevant. They read as under:

"284 WHEN ATTENDANCE OF WITNESS MAY BE DISPENSED WITH AND COMMISSION ISSUED.

(1) Whenever, in the course of any inquiry, trial or other proceeding under this Code, it appears to a Court or Magistrate that the examination of a witness is necessary for the ends of justice, and that the attendance of such witness cannot he procured without an amount of delay, expense or inconvenience which, under the circumstances of the case, would be unreasonable, the Court or Magistrate may dispense with such attendance and may issue a commission for the examination of the witness in accordance with the provisions of this Chapter : Provided that where the examination of the President or the Vice-President of India or the Governor of a State or the Administrator of a Union Territory as a witness is necessary for the ends of justice, a commission shall be issued for the examination of such a witness.
(2) The Court may, when issuing a commission for the examination of a witness for the prosecution, direct that such amount as the Court considers reasonable to meet the expenses of the accused, including the pleader’s fees, be paid by the prosecution.

285 COMMISSION TO WHOM TO BE ISSUED.

(1) If the witness is within the territories to which this Code extends, the commission shall be directed to the Chief Metropolitan Magistrate or Chief Judicial Magistrate, as the case may be, within whose local jurisdiction the witness is to, be found.
(2) If the witness is in India, but in a State or an area to which this Code does not extend, the commission shall be directed to such Court or officer as the Central Government may, by notification, specify in this behalf.
(3) If the witness is in a country or place outside India and arrangements have been made by the Central Government with the Government of such country or place for taking the evidence of witnesses in relation to criminal matters, the commission shall be issued in such form, directed to such Court or officer, and sent to such authority for transmission, as the Central Government may, by notification, prescribe in this

behalf. "

Thus in cases where the witness is necessary for the ends of justice and the attendance of such witness cannot be procured without an amount of delay, expense or inconvenience which, under the circumstances of the case would be unreasonable, the Court may dispense with such attendance and issue a commission for examination of the witness. As indicated earlier Dr. Greenberg has refused to come to India to give evidence. His evidence appears to be necessary for the ends of Justice. Courts in India cannot procure his attendance. Even otherwise to procure attendance of a witness from a far of country like USA would generally involve delay, expense and/or inconvenience. In such cases commissions could be issued for recording evidence. Normally a commission would involve recording evidence at the place where the witness is. However advancement in science and technology has now made it possible to record such evidence by way of video conferencing in the town/city where the Court is. Thus in cases where the attendance of a witness cannot be procured without an amount of delay, expense or inconvenience the Court could consider issuing a commission to record the evidence by way of video conferencing.

21. It was however submitted that India has no arrangement with the Government of United States of America and therefore commission cannot be issued for recording evidence of a witness who is in USA. Reliance was placed on the case of Ratilal Bhanji Mithani v. State of Maharashtra [(1972) 3 SCC 793]. In this case a commission was issued for examination of witnesses in Germany. The time for recording evidence on commission had expired. An application for extension of time was made. It was then noticed that India did not have any arrangement with Germany for recording evidence on commission. At page 798 this Court observed as follows:

"25. The provisions contained in Sections 504 and 508-A of the Code of Criminal Procedure contain complimentary provisions for reciprocal arrangements between the Government of our country and the Government of a foreign country for Commission from Courts in India to specified courts in the foreign country for examination of witnesses in the foreign country and similarly for Commissions from specified courts in the foreign country for examination of witnesses residing in our country. Notifications Nos. SRO 2161, SRO 2162, SRO 2163 and SRO 2164 all, dated November 18, 1953, published in the Gazette of India Part II, Section 3 on November 28, 1953, illustrate the reciprocal arrangements between the Government of India and the Government of the United Kingdom and the Government of Canada for examination of witnesses in the United Kingdom, Canada and the examination of witnesses residing in India.

26. In the present case, no notification under Section 508-A of the Code of Criminal Procedure has been published specifying the courts in the Federal Republic of West Germany by whom commissions for examination of witnesses residing in India may be issued. The notification, dated September 9, 1969, in the present case under Section 504 of the Code of Criminal Procedure is not based upon any existing complete arrangement between the Government of India and the Government of the Federal Republic of West Germany for examination of witnesses residing in West Germany. The notification, dated September 9, 1969, is ineffective for two reasons. First, there is no reciprocal arrangement between the Government of India and the Government of the Federal Republic of West Germany as contemplated in Sections 504 and 508-A of the Code of Criminal Procedure. Secondly, the notification under Section 504 is nullified and repelled by the affidavit evidence adduced on behalf of the State that no agreement between the two countries has yet been made.

27. In the present case, extension of time was granted in the past to enable the State for examination of witnesses in West Germany and return of the commission to this country. The State could not obtain the return of the commission. Now, a question has arisen as to whether any extension of time should be made when it appears that reciprocal arrangements within the contemplation of Sections 504 and 508-A of the Code of Criminal Procedure are not made. The courts do not make orders in vain. When this Court finds that there are no arrangements in existence within the meaning of Sections 504 and 508-A of the Code of Criminal Procedure this Court is not inclined to make any order."

This authority, which is of a Constitution Bench of this Court, does suggest that no commission can be issued if there is no arrangement between the Government of India and the country where the commission is proposed to be issued. This authority would have been binding on this Court if the facts were identical. Ms. Jaising had submitted that notwithstanding this authority a difference would have to be drawn in cases where a witness was not willing to give evidence and in cases where the witness was willing to give evidence. She submitted that in the second class of cases commissions could be issued for recording evidence even in a country where there is no arrangement between the Government of India and that country.

22. In this case we are not required to consider this aspect and therefore express no opinion thereon. The question whether commission can be issued for recording evidence in a country where there is no arrangement, is academic so far as this case is concerned. In this case we are considering whether evidence can be recorded by video-conferencing. Normally when a Commission is issued, the recording would have to be at the place where the witness is. Thus Section 285 provides to whom the Commission is to be directed. If the witness is outside India, arrangements are required between India and that country because the services of an official of the country (mostly a Judicial Officer) would be required to record the evidence and to ensure/compel attendance. However new advancement of science and technology permit officials of the Court, in the city where video conferencing is to take place, to record the evidence. Thus where a witness is willing to give evidence an official of the Court can be deported to record evidence on commission by way of video-conferencing. The evidence will be recorded in the studio/hall where the video-conferencing takes place. The Court in Mumbai would be issuing commission to record evidence by video conferencing in Mumbai. Therefore the commission would be addressed to the Chief Metropolitan Magistrate, Mumbai who would depute a responsible officer (preferably a Judicial Officer) to proceed to the office of VSNL and record the evidence of Dr. Greenberg in the presence of the Respondent. The officer shall ensure that the Respondent and his counsel are present when the evidence is recorded and that they are able to observe the demeanour and hear the deposition of Dr. Greenberg. The officers shall also ensure that the Respondent has full opportunity to cross-examine Dr. Greenberg. It must be clarified that adopting such a procedure may not be possible if the witness is out of India and not willing to give evidence.

23. It was then submitted that there would be practical difficulties in recording evidence by video conferencing. It was submitted that there is a time difference between India and USA. It was submitted that a question would arise as to how and who would administer the oath to Dr. Greenberg. It was submitted that there could be a video image/audio interruptions/distortions which might make the transmission inaudible/indecipherable. It was submitted that there would be no way of ensuring that the witnesses is not being coached/tutored/prompted whilst evidence was being recorded. It is submitted that the witness sitting in USA would not be subject to any control of the Court in India. It is submitted that the witness may commit perjury with impunity and also insult the Court

without fear of punishment since he is not amenable to the jurisdiction of the Court. It is submitted that the witness may not remain present and may also refuse to answer questions. It is submitted that commercial studios place restrictions on the number of people who can remain present and may restrict the volume of papers that may be brought into the studio. It was submitted that it would be difficult to place textbooks and other materials to the witness for the purpose of cross-examining him. Lastly, it was submitted that the cost of video conferencing, if at all permitted, must be borne by the State.

24. To be remembered that what is being considered is recording evidence on commission. Fixing of time for recording evidence on commission is always the duty of the officer who has been deputed to so record evidence. Thus the officer recording the evidence would have the discretion to fix up the time in consultation with VSNL, who are experts in the field and who , will know which is the most convenient time for video conferencing with a person in USA. The Respondent and his counsel will have to make it convenient to attend at the time fixed by the concerned officer. If they do not remain present the Magistrate will take action, as provided in law, to compel attendance. We do not have the slightest doubt that the officer who will be deputed would be one who has authority to administer oaths. That officer will administer the oath. By now science and technology has progressed enough to not worry about a video image/audio interruptions/distortions. Even if there are interruptions they would be of temporary duration. Undoubtedly an officer would have to be deputed, either from India or from the Consulate/Embassy in the country where the evidence is being recorded who would remain present when the evidence is being recorded and who will ensure that there is no other person in the room where the witness is sitting whilst the evidence is being recorded. That officer will ensure that the witness is not coached/tutored/prompted. It would be advisable, though not necessary, that the witness be asked to give evidence in a room in the Consulate/Embassy. As the evidence is being recorded on commission that evidence will subsequently be read into Court. Thus no question arises of the witness insulting the Court. If on reading the evidence the Court finds that the witness has perjured himself, just like in any other evidence on commission, the Court will ignore or disbelieve the evidence. It must be remembered that there have been cases where evidence is recorded on commission and by the time it is read in Court the witness has left the country. There also have been cases where foreign witness has given evidence in a Court in India and that then gone away abroad. In all such cases Court would not have been able to take any action in perjury as by the time the evidence was considered, and it was ascertained that there was perjury, the witness was out of the jurisdiction of the Court. Even in those cases the Court could only ignore or disbelieve the evidence. The officer deputed will ensure that the Respondent, his counsel and one assistant are allowed in the studio when the evidence is being recorded. The officer will also ensure that the Respondent is not prevented from bringing into the studio the papers/documents which may be required by him or his counsel. We see no substance in this submission that it would be difficult to put documents or written material to the witness in cross-examination. It is now possible, to show to a party, with whom video conferencing is taking place, any amount of written material. The concerned officer will ensure that once video conferencing commences, as far as possible, it is proceeded with without any adjournments. Further if it is found that Dr Greenberg is not attending at the time/s fixed, without any sufficient cause, then it would be open for the Magistrate to disallow recording of evidence by video conferencing. If the officer finds that Dr. Greenberg is not answering questions, the officer will make a memo of the same. Finally when the evidence is read in Court, this is an aspect which will be taken into consideration for testing the veracity of the evidence. Undoubtedly the costs of video conferencing would have to be borne by the State.

25. Accordingly the impugned judgment is set aside. The Magistrate will now proceed to have the evidence of Dr. Greenberg recorded by way of video conferencing. As the trial has been pending for a long time the trial

court is requested to dispose off the case as early as possible and in any case within one year from today. With these directions the Appeals stand disposed of. The Respondent shall pay to the State and the complainant the costs of these Appeals.

JUDIS