

**IN THE COURT OF SH. SANJEEV AGGARWAL,
SPECIAL JUDGE (PC ACT) (CBI)-10,
ROUSE AVENUE DISTRICT COURT, NEW DELHI**

**CNR No. : DLCT11-001094-2019
Case No. : CBI 274/2019
CC No. : 05/2012
RC No.: DAI-2010-A-0041 & 42
Branch : CBI/ACB/New Delhi
U/Sec : 120B, 420, 468, 471 IPC and
13(2) r/w 13(1)(d) of P.C.Act, 1988**

**CBI Vs. T. S. Darbari & Ors.
(IA No. 5/2024)**

31.07.2024

ORDER

1. Vide this order, I shall dispose off an application, moved on behalf of the prosecution / CBI for issuance of summons for recording evidence through video conferencing of the witnesses residing at United Kingdom.

2. The relevant facts, as stated in the present application are as under :

1. That the aforesaid case is pending trial before this Hon'ble Court at the stage of prosecution evidence.

2. That in order to examine witnesses residing at United Kingdom, summons were got issued from this Hon'ble Court and were sent to Ministry of Home Affairs for service on the witnesses at United Kingdom through prescribed diplomatic channel. Even after best efforts, no witness is appearing for evidence from United Kingdom, since long.

3. That, the summons were served upon through diplomatic channel on the witness Shri Anil Devani,

Company Director of Movietech, Pinewood Studios, Pinewood road, Iver Heath, Bucks, SLOONH. However, Ministry of Home Affairs vide letter dated 14.02.2024 has conveyed that the witness Shri Anil Devani has expressed his inability to visit India and requested to record his evidence through video conferencing. Copy of the reference is enclosed as Annexure-A.

4. That, in view of the aforesaid circumstances, it is proposed to record the evidence of the following United Kingdom based witnesses through video conferencing:-

S. No.	Name & address of the witness
1.	Mr. Wendy McCaffrey of Portable Toilets Ltd., Unit 2, Abergarw Trading Estate, Bridgend, CF32 9LW, London, United Kingdom.
2.	Mr. Tarique Ghaffur, Chairman of Community Safety Development, Global Group (CSD UK LTD.), Meridian House, 5th Floor, 42 Upper Berkley Street. London W1H5QJ.
3.	Mr. Anil Devani, Company Director of Movietech, Pinewood Studios. Pinewood road, Iver Heath, Bucks, SL00NH.

5. That, copy of the relevant MHA Guidelines dated 04.12.2019 are enclosed for kind perusal of the Hon'ble Court.

Therefore, it is prayed that the evidence of the aforesaid United Kingdom based witnesses may kindly be recorded through video conferencing and the summons in the prescribed format may please be issued for service the witnesses through diplomatic channel.

3. Reply to the said application has only been filed by accused no.

1 T. S. Darbari. The other accused persons i.e. accused no. 2 Sanjay Mohindroo, accused no. 3 M. Jeychandren and accused no. 4 Ashish Patel had stated on 20.05.2024 that they do not want to file any reply to the above application of the prosecution, thereby an inference can be drawn that they are not opposing the said application.

4. The only reply has been filed on behalf of accused no. 1 T. S. Darbari, who has also filed written submissions. In the reply filed by him to the said application, it is stated as under :

1. The Prosecution has served the Witness Anil Devani with summon's only twice in the past. The first summons was served in the year earlier to 2023 and the second summons was served in the year 2023 (25.05.2023). A summons was sought to be served to the Witness Mr. Anil Devani in the year 2024. However, the same was not served.

2. Pertinently no, summons have ever been served to the two witnesses namely Witness Wendy McCaffrey or for that matter Witness Tarique Ghaffur.

3. It may thus be seen that consistent or best efforts for witness summon service has not been carried out by the Prosecution. It may not be out of place to state here, that in a criminal trial where the rights of the accused have to be not only safe guarded but seen to be safeguarded as well. A proper and diligent effort has to be undertaken by the Prosecution to serve summons to the witness in order to aid and assist the trial. It is only after the best effort is done by the Prosecution and if in spite of that, the witnesses do not appear for physical examination does the Prosecution apply to the court for alternative mode of witness examination by video-conferencing.

4. In the present case, the Witness Anil Devani, in response to

the summon issued prior 2023 had merely sought time to appear in person for witness examination. Thus the Witness Anil Devani did not show his inability to appear in person at that time.

5. Whereas, with respect to the summons of 2023 Witness Anil Devani had merely stated his inability. Significantly, the ground of his inability or the reason for his inability was never so stated. Moreover the said witness was never responded to by the Prosecution enquiring from him as to the reason for his inability to appear for physical witness examination.

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7. It may thus be seen that the Prosecution has miserably failed to secure the presence of the witness in India for witness examination and that there is no effort leave alone best effort by the Prosecution to secure presence of the Witness Anil Devani in India.

8. It is thus stated in short, that in so far as Anil Devani is concerned the Prosecution has a very slack and irresponsible attitude with regard to the summons sent to him, whereas, strikingly no summons have ever been sent to the other two witness especially Witness Wendy McCaffrey or Witness Tarique Ghaffur.

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1. No fresh summons has been served for any of the three witnesses for physical appearance on any date in the year 2024. In fact no summons have ever been served for the presence of witness namely Witness Wendy McCarrefy and Witness Tarique Ghaffur.

2. Pertinently, if a fresh summons would be served on the three witness for a physical appearance for a date in 2024 or

2025 there is every likelihood that the said witnesses may be present for physical appearance.

3. In the year 2022 and 2023 the international situation with regard to International travel was different. The world had just got out of a pandemic situation and the air travel bookings were costly and not easy to obtain.

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1. It is a well-known situation, that a foreign witness is reluctant to appear in a different country for witness recording. Moreover, this reluctance can be overcome only if the Prosecution takes care of the travel cost and arrangement of the witness well in advance.

2. It is the bounden duty of the Prosecution to keep a constant communication with the foreign witnesses for an appropriate, safe and cost free travel and lodging in the witness examination country. In the present case, there is nothing on record to show and demonstrate that the Prosecution has discharged this duty vis-à-vis the foreign witness.

3. The Prosecution has not communicated at all with the foreign witness and rather, has not even responded to the emails of the foreign Witness Anil Devani.

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1. It is trite law, that if an application is to be made to a court for permission for the recording of evidence through video-conferencing then the court shall order the recording of the evidence through video-conferencing only by the exercise of sound judicial discretion. In the special facts and circumstances of the each case.

2. Witness examination by physical examination is a norm. whereas, witness examination sought to be done by the video-conferencing is a deviation from the norm. Thus, an applicant

seeking witness examination by video conferencing has to discharge the onus of satisfying the court of the special facts and circumstances on which such request is being made.

3. It is submitted that in its bare one and a half page application the Prosecution has failed in its duty casted upon it to satisfy this Hon' ble Court about the material facts.

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1. The Prosecution has made absolutely no effort to serve two witness even once. And is straight away seeking the presence of the two said witness under the said application namely Wendy McCfreey and Tarique Ghaffur.

2. The Prosecution has only sent two summons to witness Anil Devani prior to the year 2023 and in the year 2023 respectively. The Prosecution has not taken any efforts to serve a third summon to Anil Devani for his physical appearance.

3. The Prosecution has not even cared to reply to the various emails sent by witness Anil Devani with regard to his physical appearance in India.

4. The Prosecution has never handheld the witness Anil Devani to obtain his presence in India for physically recording his evidence in India.

5. The Prosecution has not brought any material on record to show and demonstrate that it had either communicated or made safe, comfortable travel arrangement of the witness Anil Devani to enable him to travel to India for recording of his evidence physically in India.

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1. In case of physical recording of the evidence, the physical demeanour is not only noted by the court but also by the accused in the course of examination before putting further

questions to the accused. The accused tailors its examination many a times upon a visual appreciation of the demeanour of the witness, who is standing right next to the accused. This very important and significant right of the accused gets diluted, in an examination of witness through video-conferencing.

2. In spite of the stated safeguards set out in the procedure in the recording of evidence through the Video conferencing mode, it is often seen that the witness is open coaxing an tutoring. The Court in spite of the procedural safeguards is unable to fully examine or contain the interference by third parties. The procedural guidelines as set out by the MHA do not over-ride the safeguards as set out in the Cr.P.C and as such this Hon' ble Court has to consider the guidelines with regard to the facts of each case.

Therefore, it is stated that the above application is liable to be dismissed.

5. I have heard Sh. V. K. Ojha, Ld. Sr. PP for CBI, Sh. R. K. Thakur, Ld. Counsel for accused no. 1 and perused the record. I have also gone through the written submissions filed on behalf of accused no. 1.

6. The Hon'ble Delhi High Court has notified the Video Conferencing Rules, 2021 dated 26.10.2021 (in short "VC Rules"). As per Rule 5.3.11 of the VC Rules, it is stated that where examination is to take place in a criminal case, of a person located outside the country, the provisions of Mutual Legal Assistance Request and Service of Summons shall be followed. Further before employing its discretion to carry out examination of witnesses via video conference, the Court shall obtain

consent of the accused.

7. In the present case, the accused persons namely accused no. 2 Sanjay Mohindroo, accused no. 3 M. Jeychandren and accused no. 4 Ashish Patel had stated on 20.05.2024 that they do not want to file any reply to the above application of the prosecution, thereby an inference can be drawn that they are not opposing the said application. The objection has only been raised by accused no. 1 T. S. Darbari primarily on the ground that as far as PW Sh. Anil Diwani is concerned, the attitude of the prosecution is very slack and irresponsible and fresh summons may have been issued for his physical examination, as foreign witness is always reluctant to appear.

8. In the present case along with the present application, the prosecution has also filed an e-mail received from the said witness dated 07.02.2024, wherein he has prayed for recording his evidence through video conferencing.

9. Regarding the other two other witnesses namely Wendy McCaffrey and Tarique Ghaffur, it is stated that the summons were never served upon them by the prosecution for any date of hearing.

10. From the application of the prosecution, it appears that no summons have been served upon the said two witnesses mentioned above, however, the Ld. Sr. PP for CBI and the IO orally stated during the course of arguments, that they had contacted the said witnesses, but they are most reluctant to come to India to depose in the present matter and they also want their evidence to be recorded through video conference.

11. The said witnesses may be reluctant to physically come to India due to assorted reasons, may be due to distance and the time and energy,

which may be consumed by coming staying and going back to their country, as also due to their pre-occupations in their official / private work; or also due to health and medical reasons, the said reasons could be plenty, however, it is not clear why the accused is opposing the said evidence to be recorded through video conferencing, more so when the other three accused persons have no objection thereto.

12. In the present world there is no difference between physical presence and virtual presence, as the entire world is integrated virtually. Everything in this world now a days is happening almost virtually, all transnational meetings, interviews, broadcast(s) and other important happenings are all done through video-conferencing. It is not clear why this accused no. 1 in the present electronic age is opposing the same. It appears that the only reason why he is opposing the recording of the evidence of the above witnesses through video-conferencing is somehow to delay the trial. Therefore, his consent appears to be vitiated by the aforesaid thought and conduct.

13. Regarding the another objection raised by Ld. Counsel for accused no. 1 that the accused will be prejudiced, as the court and the accused will not be able to observe the demeanour of the witnesses, the same also lacks merit. In this regard, the judgment of the Hon'ble Delhi High Court in the case titled as ***Vinod Kumar and Anr. Vs. State, Criminal M.C.No. 9100/2023 and Crl. M.A. No. 33976/2023 decided on 22.12.2023***, is relevant.

14. In the said judgment, it was held that the argument of the counsel that the parties and the court will not be able to observe the demeanour of the witness should be rejected as the physical demeanour of the witness is not the sole criteria of the credibility of the witness and the

demeanour of the witness, can be observed through video conferencing by the Defence Counsel and the Presiding Officer, as the witness will be visible on the screen to the Court, Ld. Prosecutor and the Ld. Defence counsel.

15. In view of the aforesaid discussion, the present application moved by CBI stands allowed. Accordingly, the deposition of the aforesaid witnesses namely Mr. Wendy McCaffrey, Mr. Tarique Ghaffur and Mr. Anil Devani be recorded through video conferencing.

16. In accordance with VC Rules and considering that the examination of Mr. Wendy McCaffrey, Mr. Tarique Ghaffur and Mr. Anil Devani through video conferencing will require some arrangements, CBI is directed to comply with the follow directions as given below:

- i) CBI is directed to contact the nearest Indian Consulate/Indian Embassy/Relevant High Commission of India at United Kingdom (UK), through proper channel as per VC Rules and request them to appoint a Remote Point Co-ordinator who will be present alongwith Mr. Wendy McCaffrey, Mr. Tarique Ghaffur and Mr. Anil Devani during recording of their testimonies. The Indian Consulate/Indian Embassy/High Commission of India may indicate the time that will be convenient to them for recording of the testimonies, while keeping in mind the official timing of the Court in India, which are from 10.00 AM to 04.00 PM.
- ii) The details of Remote Coordinator, including his name, Point address, designation and copy of his ID card shall be filed before this Court by the CBI, after obtaining the same through Consulate/Indian proper channel from Embassy/ relevant Indian High Commission at UK, by the next date.

iii) Mr. Wendy McCaffrey, Mr. Tarique Ghaffur and Mr. Anil Devani will be examined at Indian Consulate/Indian Embassy/relevant High Commission at UK and not at any private place. CBI may therefore, also seek response through proper channel from Indian Consulate/Indian Embassy/relevant High Commission at UK, if all the facilities necessary to carry out video conferencing as per Video Conferencing Rules, 2021, as laid down in Rule 4, Rule 9, Rule 10 and other Rules, are available there or not.

iv) Reader of this Court shall seek a response from the Computer Branch if facilities for conducting Video Conferencing are available as per Video Conferencing Rules, 2021, including the facility of Document Visualizer and in case such a facility is not available, she shall inform the Ahlmad immediately on receipt of report. The Ahlmad shall thereafter ensure that complete record of this case is digitized before the next date, so that the digitized copy of the documents can be transmitted to the witnesses by electronic means during the recording of their testimonies.

v) SP concerned of CBI to also explore the possibility of providing facility of a Document Visualizer.

vi) SP concerned of CBI shall ensure that the co-ordinators at both the points conduct a test two days prior to the date of hearing between both the points to resolve any technical problem so that testimonies be recorded without any interruption.

vii) SP concerned of CBI is directed to ensure that PWs Mr. Wendy McCaffrey, Mr. Tarique Ghaffur and Mr. Anil Devani are available at the remote point 15 minutes before the scheduled time.

viii) Incharge, Video Conferencing Room, RADC, Delhi is directed to make necessary arrangements as per the schedule in co-ordination with the concerned agencies.

ix) In case, the counsel for the accused seeks to confront the witness with any document, he shall ensure that the complete set of documents are digitized, so that they can be shared with the witnesses on Cisco Webex.

17. The present application, moved on behalf of the prosecution / CBI stands disposed off with aforementioned directions.

18. Issue court notice to SP concerned with the directions to file compliance report on the next date of hearing.

Nothing expressed hereinabove shall have any bearing on the merits of the case.

**Announced in the open
Court on this 31st day of
July 2024.**

**(Sanjeev Aggarwal)
Special Judge (PC Act)(CBI)-10
Rouse Avenue District Court
New Delhi**