

THE HIGH COURT OF DELHI AT NEW DELHI

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Judgment Pronounced on: 29.09.2010

+ W.P.(CRL) 751/2009

UOI

..... Petitioner

- versus -

GAYA S. GAYATRINATH @ SUBRAMONIUM GAYATRINATH

..... Respondent

Advocates who appeared in this case:

For the Petitioner : Mr A.S. Chandhiok, ASG with
Mr Satish Aggarwala,
Mr Sirish Aggarwal, Ms Shweta
Kakkar

For the Respondent : Mr Suman Kapoor

CORAM:-

HON'BLE MR JUSTICE BADAR DURREZ AHMED

HON'BLE MR JUSTICE V.K. JAIN

1. Whether Reporters of local papers may
be allowed to see the judgment? Yes
2. To be referred to the Reporter or not? Yes
3. Whether the judgment should be reported
in Digest? Yes

BADAR DURREZ AHMED, J (ORAL)

1. This writ petition has been filed by the Union of India, aggrieved by the order dated 12.01.2009, passed by the learned ACMM, New Delhi, whereby the application of the Union of India, requiring the respondent to make his stand clear as to whether he consented to the extradition or not was dismissed and the respondent was also discharged

under Section 7(3) of the Extradition Act, 1962 (hereinafter referred to as “the said Act”). In this writ petition, there is also a challenge to the order dated 13.07.2006, whereby the learned ACMM had directed closure of the evidence on behalf of the petitioner.

2. The main point urged by Mr Chandhiok, the learned Additional Solicitor General, appearing on behalf of the petitioner, is that the impugned order, which comprises of two parts, has been passed in ignorance of Section 10 of the said Act. He submitted that the learned ACMM, in the impugned order, observed that since no oral evidence had been led on the part of the petitioner, there did not exist any evidence on record, which could be legally read against the fugitive criminal (respondent) so as to lead to the conclusion that a prima facie case is made out in respect of the requisition made by the Government of United States of America for the purpose of being extradited.

3. Mr Chandhiok drew our attention straightaway to copies of the documents which find place at pages 21 to 358 of the paper book, which include all the documents, pertaining to the request for arrest and extradition of the respondent. He also pointed out that the charges against the respondent in the Courts of the United States of America have also been set out very clearly. He drew our attention to pages 48 and 49 of the paper book, in particular, where the charges against the respondent are clearly spelt out. Count number one relates to the charge of committing

conspiracy for bank fraud, mail fraud and wire fraud. Count number thirty is another charge of conspiracy to commit money laundering. The first count pertained to Title 18, United States Code, Sections 371, 1344, 1341 and 1343. The 30th Count was in respect of Title 18, United States Code, Section 1956 (h).

4. Section 10 of the Extradition Act, 1952 reads as under:-

“10. Receipt in evidence of exhibits, depositions and other documents and authentication thereof--(1) In any proceedings against a fugitive criminal of a foreign State under this Chapter, exhibits and depositions (whether received or taken in the presence of the person against whom they are used or not) and copies thereof and official certificates of facts and judicial documents stating facts may, if duly authenticated, be received as evidence.

(2) Warrants, depositions or statements on oath, which purport to have been issued or taken by any court of justice outside India or copies thereof, certificates of, or judicial documents stating the facts of conviction before any such court shall be deemed to be duly authenticated if—

(a) the warrant purports to be signed by a judge, magistrate or officer of the State where the same was issued or acting in or of such State;

(b) the depositions or statements or copies thereof purport to be certified, under the hand of a judge, magistrate or officer of the State or country where the same were taken, or acting in or for such State or country, to be original depositions or statements or to be true copies thereof, as the case may require;

(c) the certificate of, or judicial document stating the fact of, a conviction purports to be

certified by a judge, magistrate or officer of the State where the conviction took place or acting in or for such State;

(d) the warrants, depositions, statements, copies, certificates and judicial documents, as the case may be, are authenticated by the oath of some witness or by the official seal of a minister of the State where the same were issued, taken or given.”

5. Going back to the impugned decision of the learned ACMM, Mr Chandhiok submitted that the learned ACMM did not pay heed to the provisions of Section 10 which has been set out hereinabove. He submitted that all the documents, which have been referred to and copies of which are to be found at pages 21 to 358 of the present paper book, would fall in Section 10 and, therefore could be received as evidence even in the absence of any oral evidence which could be led on the part of the petitioner. He submitted that the learned ACMM fell in error in ignoring this aspect of the matter and in thereby holding that there was nothing on record which could be legally read against the fugitive criminal in support of the requisition made by the Government of United States of America for extradition of the respondent.

6. He also placed reliance on two decisions of the Supreme Court: *Sarabjit Rick Singh v. Union of India*: (2008) 2 SCC 417; *Rosiline George v. Union of India & Ors.*: (1994) 2 SCC 80.

7. The learned counsel for the respondent submitted that the petitioner has not made any attempt in leading oral evidence in order to

prove the said documents. He submitted that despite several opportunities being granted over a number of years, the petitioner did not come forward to produce any such oral evidence. Therefore, according to him, the learned ACMM was right in shutting out the petitioner and in discharging the respondent as there was no material on record against the respondent. He also submitted that the application, which was moved on 19.01.2007, after final arguments had been heard and orders were reserved, was misconceived and the learned ACMM was right in dismissing the said application. It was, therefore, contended by the learned counsel for the respondent that the order of the learned ACMM does not call for any interference.

8. Having considered the arguments advanced by the counsel for the parties and having examined the material on record, we are of the view that the impugned order, to the extent it relates to the dismissal of the application filed by the petitioner on 19.01.2007, whereby the respondent was required to clarify its stand as to whether he consents or he contests the extradition proceedings, was correct. The stand of the respondent (fugitive criminal) had been made clear in the order passed by this Court in W.P.(CrI.) No. 193/2005 on 05.04.2005, where the respondent had clearly indicated that he did not want to consent to the extradition but wanted to face the enquiry under Section 5 of the said Act. Thus, to this extent, the learned ACMM's order, dismissing the

application of the petitioner, which was filed on 19.01.2007, is correct.

9. However, with regard to the discharge of the respondent on the ground that there is no material on record, which could lead to the inference that there is no prima facie case against the respondent, we feel that this conclusion is not warranted in law. This is so because the learned ACMM completely ignored the provisions of Section 10 of the said Act. The learned ACMM also ought to have considered the position in law that the enquiry under Section 5, which is to be conducted as per the procedure indicated in Section 7 of the Act, was not, in the strict sense, in the nature of the trial. This has been clarified by the Supreme Court in **Sarabjit Rick Singh** (supra) in the following words:-

“45. Consistent view of the courts of India in this behalf, however, appears to be that an inquiry conducted pursuant to the order of the Central Government is only to find out whether there was a prima facie case against the fugitive criminal for extradition to the treaty country. Mode and manner of inquiry has nothing to do with the rule in regard to standard of proof.”

10. In para 47 of the same decision of the Supreme Court, it has been clearly observed that Section 10 of the said Act provides that the documents are liable to be treated and received as evidence and what is necessary for the purpose thereof is to supply copies of the documents to the fugitive criminal. In other words, the documents filed by the petitioner, to which we have referred, would constitute evidence under Section 10 of the said Act, provided the conditions stipulated therein are met. We may also note the following observations in the decision of

Rosiline George (supra):

“39. Mr K.T.S. Tulsi, learned Additional Solicitor General, has placed on the record all the documents sent by the United States of America along with the letter of request for extradition of George. We have examined the documents carefully. They are duly authenticated and certified as required under Section 10 of the Act. These documents are eligible to be treated and received as evidence under Section 10 of the Act. Since these documents have been placed on the file of the Magistrate and copies thereof given to George within two months of the apprehension of George it is futile to say that the terms of Article 11 of the 1931 treaty have been breached. As mentioned above, on May 6, 1989, George filed a writ petition before the Delhi High Court and thereafter he never permitted the proceedings before the learned Magistrate to commence. Section 10(1) of the Act makes it clear that the exhibits and depositions, whether received or taken in the presence of the person against whom they are used or not, and copies thereof and official certificates of facts and judicial documents stating facts, if duly authenticated, can be received as evidence. We are of the view that the documents referred to in Section 10 of the Act, when placed on record along with the order of the Central Government issued under Section 5 of the Act, are part of the evidence in support of extradition. The proceedings before the learned Magistrate show that the Government of India wanted to produce Mr G. Jagannathan before the Magistrate and for that purpose he was present in the court on more than one occasions but the appellant did not permit his evidence to be recorded on one pretext or the other. We see no force in the contentions of the learned counsel that there has been a violation of the provisions of Article 11 of the treaty and reject the same.”

(underlining added)

11. The following observations in **Sarabjit Rick Singh (supra)** are also relevant:

“38. Section 10 of the Act provides that the exhibits and depositions (whether received or taken in the presence of the person, against whom

they are used or not) as also the copies thereof and official certificates of facts and judicial documents stating facts may, if duly authenticated, be received as evidence. Distinction must be borne in mind between the evidence which would be looked into for its appreciation or otherwise for a person guilty at the trial and the one which is required to make a report upon holding an inquiry in terms of the provisions of the Act. Whereas in the trial, the court may look into both oral and documentary evidence which would enable it to ask question in respect of which the accused may offer explanation, such a detailed procedure is not required to be adopted in an inquiry envisaged under the said Act. If evidence stricto sensu is required to be taken in an inquiry forming the basis of a prima facie opinion of the court, the same would lead to a patent absurdity. Whereas in a trial the court for the purpose of appreciation of evidence may have to shift the burden from stage to stage, such a procedure is not required to be adopted in an inquiry. Even under the Code of Criminal Procedure existence of strong suspicion against the accused may be enough to take cognizance of an offence which would not meet the standard to hold him guilty at the trial.”

(underlining added)

12. From the above, it is clear that the documents, which are filed along with the order or subsequently in connection with the enquiry under Section 5 may be received as evidence if they fulfil the conditions stipulated in Section 10 of the said Act, without requiring any formal proof thereof. It is for the Magistrate holding the enquiry to examine this aspect of the matter. Unfortunately, the learned ACMM has not done so in the present case and has merely pushed aside all these documents, without examining the provisions of Section 10 of the said Act.

13. For these reasons, we set aside the impugned order to the extent it discharges the respondent under Section 7(3) of the said Act. The matter is remanded to the learned ACMM for continuing with the

enquiry after giving copies to the respondent of all the documents which are already on record. It shall be open to the parties to put forth their arguments before the Magistrate with regard to the applicability or otherwise of Section 10 of the said Act. The respondent would, of course, have the right to lead evidence in terms of the provisions of Section 7(2) of the said Act. The writ petition is, therefore, partly allowed. The parties should appear before the learned ACMM on 26.10.2010. Since the enquiry has taken a long time, we also direct that the same be concluded as expeditiously as possible and preferably within three months from the next date of hearing.

(BADAR DURREZ AHMED)
JUDGE

(V.K. JAIN)
JUDGE

SEPTEMBER 29, 2010
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