

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ **CS(OS) NO.1966/1999**

Date of Decision : 04.07.2011

SMT. ANUBHA

..... Plaintiff

Through: Mr.Rajat Aneja, Adv.

Versus

SH.VIKAS AGRAWAL

..... Defendant

Through: Mr. Sachin Datta, Adv.

CORAM :

HON'BLE MR. JUSTICE V.K. SHALI

- | | | |
|----|---|-----|
| 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 the Digest ? | YES |

V.K. SHALI, J.

IA No. 4197/2004 (contempt)

1. The question involved in the present contempt application is whether the proceedings for execution of contempt order passed against the defendant should be monitored by this Court or should the proceedings of the present contempt case be adjourned sine die till the time the defendant is extradited to face the trial in respect of other connected extraditable matters which are purportedly pending against him in the District Court of Gautam Budh Nagar(UP). Before deciding the said question, it would be pertinent here to give the brief background of the case.

2. The plaintiff got married to the defendant Mr. Vikas Agrawal, a Non-Resident Indian (NRI) on 11.5.99 according to Hindu rites and ceremonies. The defendant was a Non-Resident Indian at the time of marriage residing at 29, Woodlawn Avenue, Ansonia, Connecticut-06401 (USA) and was a HBI-4 Visa Holder. He was employed as a software Engineer with M/s CAPITAL ONE at 11011, West Broad Street, Glen Allen, Virginia-23060 (USA).
3. The present plaintiff went to USA, however, on account of temperamental incompatibility, the marriage could not last and she came back to India and instituted the present suit seeking declaration that she is entitled to live separately and it was also prayed that a permanent decree of maintenance in her favour and against the defendant for a sum of US\$1500 per month or ₹65,250/- per month calculated at the (then) prevailing rate of ₹43.50 per US \$, be passed with periodical increase therein. A similar ad interim relief was also prayed during the interregnum period till the disposal of the suit.
4. Notices were issued to the defendant who was duly represented by his counsel. On 5th November, 1999, this Court after considering the submissions of the learned counsel for the plaintiff had passed a restraint order against the defendant from pursuing the divorce petition purportedly instituted by him in the Connecticut Court, USA for a period of 30 days. The restraint order was passed in the presence of the

learned counsel for the defendant observing that the said restraint order will not cause any serious prejudice to the defendant till he files his definite statement before this Court.

5. The suit has been ultimately decreed by this Court on 27.9.2002 granting the relief as prayed for in the main suit. However, on 09.3.2000, this Court had issued a suo moto contempt notice against the defendant on account of the fact that it was brought to its notice that the defendant despite a restraint order having been passed against him, not to pursue his divorce petition before the Connecticut Court, USA had chosen to pursue the same and obtained divorce from the said Court. Show cause notice of contempt was not replied and this Court ultimately vide order dated 20.5.2004 held the defendant guilty of wilful and contumacious violation of the order dated 05.11.1999 of this Court and it had accordingly sentenced him to SI for three months and to pay a fine of ₹2,000/- under Section 12 of the Contempt of Courts Act and in default of payment of fine, the defendant shall undergo SI for one month.
6. The defendant being a Non Resident Indian and despite the decree having been passed on 27.9.2002 as well as the order dated 20.5.2004 holding him guilty for Contempt of Court has chosen not to appear before this Court resulting in adoption of coercive processes against him for procuring his attendance before this Court so that he could be made to

undergo sentence of imprisonment imposed on him. It is at this stage that this Court passed orders issuing notice to the Standing Counsel of UOI with regard to the question of extradition of the defendant from the jurisdiction of Connecticut Court, USA where he was purportedly residing and working at that point of time.

7. The UOI filed its affidavit through one Mr.D.K.Ghosh, Public Relation Officer giving therein legal position with regard to the extradition of the defendant. He had stated that since the offence of which the defendant was held guilty was not falling within the ambit of 'extradition offence' as contemplated under Section 2(c) of the Extradition Act in relation to the treaty States therefore, the defendant could not be extradited.
8. Despite this legal position having been enunciated in the affidavit in very clear terms, the Court took note of the fact that the defendant was facing prosecution in respect of two other offences, one instituted by the plaintiff for the offence of defamation punishable under Section 500/501 of the IPC and the other under Section 498A IPC which is pending in Courts of District Gautam Budh Nagar (UP). One of the offences was stated in the affidavit and in the subsequent status report to be an extraditable offence and it was observed that the details of correspondence which has been entered into between the Govt. of India and their counter parts has not yielded any fruitful result on account of the fact that the offence for which

the defendant has been convicted is not an extraditable offence. Despite this legal position, this Court went out of the way and obtained status report with regard to the efforts being made by the Govt. of India from time to time with regard to procuring the attendance of the defendant in India. As many as, 5-6 status reports have been filed over a period of almost 7 years from the date of holding the defendant guilty for an offence of contempt.

9. The question which now arises for consideration is whether under such a contingency, when there is a definite affidavit that the present offence of which the defendant has been held guilty and sentenced to imprisonment of 3 months apart from fine of ₹2000/- does not happen to be an extraditable offence, the proceedings must be permitted to continue indefinitely till the time his attendance is procured in connection with some other case or should the case be adjourned sine die to be revived at the option of the plaintiff or other official of the Government of India in case the defendant appears in India.
10. Though the answer to the above question from the side of the plaintiff's counsel has been in affirmative on the ground that once this Court has continued the existing proceedings, it may be continued, till the time the respondent is brought to the justice and sent to imprisonment in terms of the conviction order dated 20.5.2004. The learned counsel of UOI

has left it to the discretion of the Court to consider the passing of such orders as may be warranted in law.

11. The Court is faced with the dilemma as to whether the present proceedings which obviously have been going on for a period of 7 years, after holding the defendant guilty for an offence and contempt has resulted in wastage of public time at the expense of more important cases which need attention of the Court and more particularly of the cases where the accused persons are languishing in jail, should be continued or not.
12. The answer to this question, I feel should be in negative and the present proceedings ought not to be continued any further and they can be adjourned sine die with liberty to revive the same at the option of the plaintiff as and when the defendant is brought to India under extradition treaty or he appears on his own to face the consequences as may be warranted in law.
13. This order has been passed on account of the fact that admittedly the offence of contempt of Court in respect of which the defendant has been held guilty is not an extraditable offence under Section 2(c) of the Extradition Act. Section 2(c) lays down that an 'extradition offence' means in relation to a foreign State, being a treaty State, an offence provided for in the extradition treaty with that State.

14. The defendant is residing in Canada and for the purpose of making a requisition for surrendering or return of any accused or convicted person to India the provisions of the Extradition Act, 1962 (hereinafter referred to as the 'Act') have to be complied with. A requisition for surrender or return of a person can be made under Section 19 of the said Act only if the person is accused or convicted of an 'extradition offence'. Under Section 2(c) of the said Act, an 'extradition offence' means – (i) in relation to a foreign state, being a treaty state, an offence provided for in the extradition treaty with that State.
15. The Indo-Canadian Extradition Treaty, was notified on 7th May, 1987. Article 3 of the Treaty defines Extradition offences. As per clause 3(1) of the Treaty, an offence to be an extradition offence must be an offence punishable by the laws of both the contracting states by a term of imprisonment for a period of more than one year. Under Section 12 of the Contempt of Court Act, 1971 the maximum punishment is a sentence of simple imprisonment for a period of six months.
16. It is submitted that the defendant vide order dated 20.5.2004 was sentenced to imprisonment for a period of three months (and an additional period of one month in case of default in payment of fine), hence the said offence cannot be termed as an extradition offence. Even in cases involving commission of an 'extradition offence' (punishable by a term of imprisonment

for a period of more than a year), there is no duty on the Contracting State to extradite as Article 1.4 of the Treaty clearly provides that there is no duty to extradite a person sentenced in respect of an extradition offence where the actual term of imprisonment is 6 months or less. Therefore, the defendant is not held guilty of an extraditable offence and even if it is assumed that it was an extraditable offence even then the contracting State is under no obligation to extradite for the offence if the sentence is of less than six months. On both these counts, the defendant cannot be extradited.

17. It is also pertinent here to mention that the passport of the defendant has already been impounded under Section 10(3) (e) and 10(3) (h) of the Passport Act, 1967. The defendant was also holding another passport which was issued by the Consulate General of India, Toronto and the same has also been impounded.
18. That the High Commission of India, Ottawa, Ontario vide letter 4.8.2004 sought extradition of the defendant in respect of having committed criminal offences u/S 500/501, IPC and Section 72 of the IT Act, 2000. The same was done in pursuance of a request for extradition received from the Additional Chief Judicial Magistrate, Gautam Budh Nagar, UP dated 13.4.2004. In pursuance of the same extensive correspondence took place between the Ministry and the Canadian Authorities. On 09.11.2006, the General Counsel

and Director of the International Assistance Group, wrote to the Joint Secretary (Consular) that the evidence which had been provided would not meet the new test for committal for extradition laid down by the Supreme Court of Canada and hence they could not proceed with the request for extradition. Pursuant to further exchange of correspondence a reply was received from Ms.Barbara Kothe, Senior Counsel, International Assistance Group on 15.1.2008 setting out detailed reasons as to why the defendant could not be extradited in respect of the offences under Sections 500 and 501, IPC and Section 72 of the IT Act, 2000. Vide communication dated 27.2.2009 Ms. Barbara Kothe clarified as to how the International Assistance Group was authorized to determine whether to issue an authority to proceed.

19. A second FIR, under Section 498A/406 IPC has been registered at the instance of the plaintiff against the defendant. In respect thereof, the Ministry of External Affairs has requested the Canadian High Commission in New Delhi to state whether 'subjecting a woman to cruelty, under Section 498A of the Indian Penal Code and dowry related offences' satisfy the requirement of dual criminality and whether the alleged conduct of an accused person amounts to extraditable offence in the Canadian laws. The Ministry of External Affairs is making all efforts to secure extradition of the defendant in accordance with law.

20. For the above mentioned reasons, I am of the considered opinion that no useful purpose will be served by keeping the present proceedings pending before this Court as the offence of which the defendant has been found guilty could not be said to be an 'extraditable offence' and accordingly the matter is adjourned sine die with liberty to the plaintiff to revive the same as and when the defendant is extradited in respect of any other extraditable offence where he is facing trial and steps have been taken by the Govt. of India to procure his attendance under the extradition treaty. No order as to cost.

21. File be consigned to the Record Room.

V.K. SHALI, J.

July 04, 2011
RN