

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

+ Crl. M.C. No. 18/2012 & Crl.M.A. No.59/2012 (stay)

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Reserved on: 7th February, 2012

Decided on: 5th March, 2012

SWISS TIMING LTD.

..... Petitioner

Through: Mr. Amit Desai, Sr. Adv. with Mr.
Vijay Sondhi, Mr. Anirban
Bhattacharya, Ms. Sujatha
Balachander, Mr. Kapil Madan, Adv.

versus

CBI & ANR.

..... Respondents

Through: Mr. Dayan Krishnan, Mr. Gautam
Narayan, Spl. Counsels for CBI with
Mr. Nikhil Menon, Adv.
Mr. Neeraj Chaudhar, CGSC for UOI.

Coram:

HON'BLE MS. JUSTICE MUKTA GUPTA

1. The challenge in the present petition is to the orders of the learned Special Judge, CBI Court, Patiala House dated 15th December, 2011 and 19th December, 2011 whereby the learned Special Judge held that the purported service of summons upon the Petitioner was valid in law and consequently vide its order dated 19th December, 2011 observed that the Petitioner is deliberately avoiding appearance before the Trial Court and thus legal consequences would follow.

2. Learned counsel for the Petitioner contends that initially summons were issued to the Indian Embassy at Berne, Switzerland which on 9th June, 2011 by its covering letter sent the same to the Petitioner by registered A.D.

The Petitioner challenged this process and in this regard made communications to the Swiss authorities, who in turn communicated the same to the Indian Embassy on 7th July, 2011. It is contended that the order passed by the learned Trial Court issuing summons, which were served to the Petitioner by registered A.D. through Indian Embassy at Berne, were not compliant to the International treaties or even the domestic law. The Petitioner filed an application before the Trial Court on 14th July, 2011 challenging the delivery of summons dated 23rd May, 2011 placing on record the factum of the purported and illegal service together with the letter dated 7th July, 2011 issued by Federal Office of Justice (in short 'FOJ') to the Indian Embassy at Berne, Switzerland. Thus, the learned Special Judge upon hearing the Petitioner and the Respondent No.1 vide its order dated 5th August, 2011 was pleased to allow the application, issued fresh summons returnable on 4th November, 2011 and directed effecting of service of fresh summons in compliance with the provisions of MOU/ Exchange of letters dated 20th February, 1989 between the two Countries.

3. On an application filed by the CBI seeking extension of time, the date fixed for service of summons on the Petitioner was extended to 14th December, 2011. Thereafter a request made by the Indian Embassy at Berne to the FOJ in Switzerland seeking legal assistance along with the fresh summons dated 3rd September, 2011 in original issued by the learned Special Judge and other translated copies was delivered at the office of the Petitioner in Switzerland. The Petitioner thus consulted his Attorneys and on behalf of the Petitioner a letter dated 9th December, 2011 was addressed to the FOJ, Districts Attorney's office in Biel/ Bienne, Switzerland and the General

Attorney of Canton of Berne raising issues challenging the validity of the service of summons dated 3rd September, 2011. Vide letter dated 13th December, 2011 the FOJ replied to the Swiss Attorneys of the Petitioner and sought time to review the issues mentioned in the letter of the Petitioner. On 14th December, 2011 i.e. the date mentioned in the fresh summons dated 3rd September, 2011 for the appearance of the Petitioner, counsel for the Petitioner filed an application before the learned Special Judge placing on record the factum of invalid/ improper and illegal service. Respondent No.1 also filed an application on the same date placing on record the communication received from the Indian Embassy, Berne along with information from the Swiss authorities.

4. The objections of the Petitioner to the said service and proof of service are that in the eyes of law, no service has been effected on the Petitioner as the letter of the Swiss authorities itself state that a notification has been issued, without stating that the same has been delivered. Further, the service of summons on accused persons between India and Switzerland is not covered by the MOU/Exchange of letters dated 20th February, 1989. The assistance agreed to between the two Countries by the said MOU/Exchange of letters in criminal matters relates to the purpose of investigation alone. Further, the request for assistance was not made to the competent authority and the necessary translations as required under the said MOU/Exchange of letters were missing.

5. Learned counsel for the Petitioner contends that there is no concept of criminal trial in the absence of an accused. The purpose of issuing summons to an accused is to compel his appearance before the Trial Court to face

inquiry, plead to the charge, undergo trial and be available to face the judgment. According to the learned counsel, Chapter VII of the Code of Criminal Procedure provides for the procedure to compel the presence by issue of summons and the same are unlike the summons in a civil proceeding. Reliance is placed on *Parambot Thayunni Balakrishna Menon Vs. Govind Krisnan & Anr. AIR 1959 Madras 165* to contend that knowledge of summons is not sufficient. The service of summons should be effected in a criminal proceeding so as to compel the presence of the accused. Since the summons issued in the criminal proceedings are to compel the presence before the Trial Court, thus the same affects the right of life and liberty of an accused and the same can be served only by following the procedure established by law. Thus, as held in *Parambot Thayunni (supra)* summons to compel the appearance have to be served personally in criminal matters. It is contended that the provisions of Section 65 Cr.P.C. comes into operation only after Sections 61 & 64 Cr.P.C. are duly and meticulously complied with. Relying upon *Balan Nair Vs. Bhavani Amma Valsalamma & Ors. AIR 1987 KERALA 110* and *Hemendra Nath Chowdhury Vs. Smt. Archana Chowdhury AIR 1971 CALCUTTA 244* it is contended that service by post or defective service is not in conformity to the procedure established by law. For summons to compel appearance, provision has been made under Section 105 Cr.P.C., which was amended with effect from 25th May, 1988. Section 105 (1)(i) Cr.P.C. applies to the territories in India to which Cr.P.C. does not apply and Section 105 (1)(ii) Cr.P.C. applies to other Countries where arrangements have been made. Section 105 (2) Cr.P.C. relates to summons received in India. The statutory scheme as envisaged should be strictly complied with. In terms of Section 105(1)(ii) Cr.P.C. the summons

to be served on a person to compel appearance in another country is a Court to Court process. Admittedly, in case of a conflict between a treaty law and the municipal law, the municipal law will prevail as held in *Bhavesh Jayanti Lakhani v. State of Maharashtra and Ors.* (2009) 9 SCC 551. The law is clear that strict construction application is required in extradition or summons process law, in view of the consequences that follow on non-appearance pursuant to service of summons. In case, substantive rights of a person are violated, the superior Court will entertain the petition to enforce rights of the human-beings.

6. In the present case, the request from the Indian Embassy to the FOJ & P is itself not translated and the summons have not gone to a Court in Switzerland. Thus there is no necessary compliance of the mutual agreement between the two Countries. The Exchange of letters dated 20th February, 1989 between India and Switzerland relates to investigation only. It does not relate to compelling presence in a Court as an accused in India or Switzerland. Further, Section 105 Cr.P.C. requires for issuance of a notification, which notification has not been issued as yet. No document has been received by the Swiss Court as the summons from the Indian Embassy in Berne, Switzerland has been addressed to the FOJ, Switzerland. In view of non-enclosing the translation and the fact that the summons were not addressed to the proper authorities, the authorities as well as the Petitioners were under the impression that it was a “Letter Rogatory”.

7. According to learned counsel for the Petitioner, the Federal Act on International Mutual Assistance in Criminal Matters (IMAC) deals with service of summons and according to Article 69 of IMAC sending of letters

does not contemplate service of summons. The Petitioner can pray that he should be given necessary protection in case he has to appear. The procedures cannot be bye-passed. Relying upon *Daya Singh Lahoria Vs. Union of India & Ors. (2001) 4 SCC 516* it is contended that the rights of a citizen cannot be taken away except in strict compliance of the law laid down. The procedural law is to ensure that there is enough safety and rights are guaranteed. Thus, the impugned orders of the learned Trial Court declaring service to be complete and consequences to follow are liable to be set aside.

8. Per contra learned counsel for the Respondent contends that the present petition as framed is not maintainable as the Petitioner states that it is not submitting itself to the jurisdiction of this Court and is appearing under protest. Thus a person, who does not submit to the jurisdiction, can claim no relief from the Court. Learned counsel contends that the summons dated 3rd September, 2011 have admittedly been served on the Petitioner and thus the issues raised are academic in nature. The Exchange of letters dated 20th February, 1989, which constitutes a treaty between India and Switzerland with respect to the mutual assistance in legal matters, contemplates service of summons. The treaty provides for legal assistance in investigation as well as in prosecution of criminal offences including offences involving fraud, abuse of official powers to obtain unlawful profits etc. The procedure followed by the Trial Court in respect of serving the summons dated 3rd September, 2011 is in accordance with the provisions of the treaty. Therefore, this Hon'ble Court will desist from substituting its view for the view of the requested State.

9. Learned counsel for CBI points out to the letter of learned counsel for the Petitioner in Switzerland, who vide letter dated 9th December, 2011 stated to the Swiss authorities to refrain from delivering the proof of delivery to the Indian authorities. According to the learned counsel, this conduct of the Petitioner in asking not to deliver the proof of delivery to Indian authorities is wholly unbecoming and the present petition is liable to be dismissed on this short ground itself. In the application filed before the learned Trial Court, the Petitioner has admitted that fresh summons have been delivered in strict compliance of the Exchange of letters and thus now in the present petition the Petitioner cannot claim that the Exchange of letters is not applicable to summons for procuring the attendance and pertains only at the stage of investigation. In the first application the Petitioner admitted that the arrangement for procuring the attendance between two Countries was Exchange of letters entered into on 20th February, 1989. The Exchange of letters include an arrangement for dealing with the procedure during trial and both the authorities i.e. Indian and Swiss accept that Exchange of letters constitute a treaty.

10. According to the learned counsel, the Exchange of letters provides for service of judicial documents which include summons for appearance. A perusal of the summons dated 3rd September, 2011 establishes that the same is not compulsive and only requires appearance on the date fixed before the Trial Court. It is pertinent to note that even the IMAC expressly contemplates and provides for rendering of assistance with regard to service of summons (Article 63). Furthermore, the IMAC expressly contemplates service of summons even through compulsive processes based on the

principle of double criminality. The request for assistance sought in respect of service of the summons was duly acceded to and executed by the Swiss authorities as communicated vide their note verbale dated 22nd November, 2011. It is therefore clear that the request was in accordance with the provisions of the treaty as well as the IMAC. Had this not been the position, the request would not have been executed as was done in the past vide letter dated 7th July, 2011. The contention that the service of summons is vitiated owing to the fact that the request for assistance dated 31st October, 2011 was in English and not translated is wholly without merit. It is submitted that this request was meant only for the Swiss authorities and not for the accused. No prejudice whatsoever has been caused to the Petitioner in this respect.

11. Learned counsel for the CBI further submits that Section 105 Cr.P.C. does not provide for a Court to Court mandatory procedure as it is inter-countries and one country cannot control the procedure of another. Section 105 Cr.P.C. comprises of two parts; where in the first portion the word 'shall' is used and is thus mandatory and in the second portion the word 'may' is used and is thus directory in nature. The issue of one provision containing both mandatory and directory provisions came up for consideration before the Hon'ble Supreme Court in *Jamatraj Kevalji Govani Vs. State of Maharashtra AIR 1968 SC 178* wherein their Lordships interpreted that the use of the word 'may' in the first part and 'shall' in the second part firmly establishes this difference. It is stated that any other interpretation will lead to absurdity. Further non-issuance of Notification under Section 105 Cr.P.C. is irrelevant as neither the Parliament can impose its will on any other sovereign jurisdiction nor this Country can change the

designated authority in other Country. It is thus contended that the impugned judgment of the learned Trial Court is just and proper and every care has been taken to see that the requirements of the treaty and the law are satisfied while serving summons to the Petitioner.

12. I have heard learned counsel for the parties. The facts giving rise to filing of the present petition by the Petitioner are that on 23rd May, 2011 the learned Special Judge was pleased to take cognizance on the charge-sheet filed by the CBI in RC No.DAI-2010-A-0044 alleging commission of offences under Section 120-B read with 420 IPC and Section 13(2) read with Section 13(1)(d) of the Prevention of Corruption Act, 1988 arraying the Petitioner as accused No.11. The learned Special Judge vide order dated 23rd May, 2011 directed that summons be issued to the company through its CEO by diplomatic channels through Ministry of External Affairs, Interpol returnable on 14th July, 2011. On 9th June, 2011 a letter was sent by the Embassy of India, Berne to the Petitioner informing it about the next date of hearing and enclosing summons in original. In response to the above-said request of the Embassy of India on a letter written by the Petitioner to the FOJ, the FOJ, Switzerland vide letter dated 7th July, 2011 informed that the requested assistance was being denied owing to the fact that in terms of the Exchange of letters the summons to a firm in Switzerland, German speaking canton were required to be translated into German. It was further stated that the summons were required to be received more than 30 days before the date of hearing fixed and the summons should be enclosed with the summary of the case. Pursuant to service of summons, an application was filed on behalf of the Petitioner before the learned Special Judge though admitting the

service of summons, however stating that the said service of summons was not in compliance with the Exchange of letters. The Learned Special Judge thereafter issued fresh summons to the Petitioner, as per the Exchange of letters, vide order dated 3rd September, 2011.

13. The said summons were forwarded by the Embassy of India at Berne to the FOJ in Switzerland which further informed the Indian Embassy on 22nd November, 2011 that the summons had been issued. The Embassy of India sent an E-mail to the Respondent herein informing that the Swiss authorities have responded to the request for service of summons in the form of a note verbal dated 22nd November, 2011. On 14th December, 2011 the Petitioner filed two applications before the learned Special Judge though admitting delivery of summons dated 3rd September, 2011, however disputing the validity of service of summons. It was stated that the filing of the applications by the Petitioner ought not to be treated as submitting to the jurisdiction of the learned Special Court or admitting that the service of summons was legal and valid in accordance with law. On the said applications of the Petitioner, the learned Special Judge vide impugned order dated 15th December, 2011 held that there was no ground to allow the plea of the Petitioner and to hold that it has not been legally served in this case. The learned Special Judge further held that the Petitioner has been duly served and as it appeared that the Petitioner was intentionally avoiding appearance before the Court only with a view to further delay the trial, thus legal consequences would follow.

14. The issues involved in the present petition are the interpretation of Section 105 Cr.P.C., whether the Exchange of letters dated 20th February,

1989 between India and Switzerland constitutes a binding treaty, whether the same relates to the process of enquiry and trial to compel presence of an accused before the Court and whether a notification under Section 105 Cr.P.C. is mandatory in nature. The relevant portion of Section 105 Cr.P.C. reads as under:

“105. Reciprocal arrangements regarding processes.

(1) Where a court in the territories to which this Code extends (hereafter in this section referred to as the said territories desires that-

(i) Within the local jurisdiction of a court in any State or area in India outside the said territories, it may send such summons or warrant in duplicate by post or otherwise, to the presiding officer of that court to be served or executed; and where any summons referred to in clause (a) or clause (c) has been so served, the provisions of section 68 shall apply in relation to such summons as if the presiding officer of the court to whom it is sent were a Magistrate in the said territories;

(ii) In any country or place outside India in respect of which arrangements have been made by the Central Government with the Government of such country or place for service or execution of summons or warrant in relation to criminal matters (hereafter in this section referred to as the contracting State), it may send such summons or warrant in duplicate in such form, directed to such court, Judge or Magistrate, and sent to such authority for transmission, as the Central Government may, by notification, specify in this behalf.”

15. A perusal of Section 105 (1) (ii) Cr.P.C. provides that in case of summons to an accused issued by a Court in India shall be served or executed at any place in any Country or place outside India in respect of which arrangements have been made by the Central Government with the

Government of such Country or place for service or execution of summons or warrants in relation to the criminal matters, may be sent in duplicate in such forms, directed to such Court, Judge or Magistrate and sent to such authority for transmission, as the Central Government may by notification specify in this behalf. Thus, though the serving or execution of the summons at a place or Country is mandatory, however sending of such summons or warrants to such Court, Judge or Magistrate and to such authority for transmission as may be notified is directory in nature. The reason for the second portion of clause (ii) of Section 105 (1) being directory in nature is that the Indian Government cannot determine the authority or the Court, Judge or Magistrate of another Sovereign State. To that extent it has to follow the authority specified by the contracting State. A perusal of the Exchange of letters dated 20th February, 1989, which the Petitioner initially admitted to be the treaty between India and Switzerland shows that it relates not only to mutual assistance with regard to matters pending investigation but also pending trial. The Exchange of letters dated 20th February, 1989 between India and Switzerland is reproduced as under:

“LE CHEF 3003 Berne, 20 February 1989
DEPARTMENT FEDERAL
AAFAIRES ENTRANGERES

Excellency,

I have the honour to acknowledge receipt of your letter 20th February, 1989, which read as follows:

“Your Excellency,

I have the honour to refer to the exchange of views between the delegations of India and Switzerland on the question of providing mutual assistance in criminal matters, and on the basis of the understanding reached between the two delegations, the Government of India proposes to the Government of Switzerland that the authorities of both countries competent to investigate offences shall provide to each other, on the basis of reciprocity and in accordance with their national law, the widest measure of assistance in criminal matters as follows:

1. Cooperation between law enforcement authorities may include assistance in locating witnesses, obtaining statements and testimony of witnesses, production and authentication of judicial or business records, service of judicial or administrative documents and restitution of objects or valuables originating from the offences for the purpose of returning them to the entitled persons. Further within the limits of the law of the requested State, information will also be provided on the assets owned or possessed by persons who are the subjects of the investigation in the requesting country.

2. Taking of evidence and production of documents by the use of compulsory measures for the purpose of criminal proceedings in India or Switzerland as far as the facts described in the request would also be an offence punishable under the laws of both countries. For this purpose, India and Switzerland regard the expression “criminal proceedings” as including trial of a person for an offence or a proceeding to determine whether to place a person who is accused of an offence on trial for that offence. Under Indian law the competent authority to ask for assistance abroad is the Court, tribunal, judge or magistrate exercising jurisdiction. Under Swiss law the competent authority to ask for assistance abroad is any examining magistrate, notwithstanding the denomination of ‘Bezirksanwalt, Untersuchungsrichter, juge d’instruction, Verhorrichter’ a. s. o. and all judicial authorities.

3. Taking statements of persons without the use of compulsory measures.
4. Provision of publicly available documents and records being documents and records that are available to the public as being part of a public register or that are otherwise available to the public for purchase.
5. Service of documents which does not involve exercise of any measure to compel any person to comply with any requirement set out in those documents.
6. Investigation of crime by Police or other law enforcement agencies not involving the exercise of any measure to compel any person to answer questions or to provide information.
7. There may be other ways in which assistance could be rendered in criminal matters and India and Switzerland would be prepared to consider whether other forms of assistance could be provided in particular cases upon request.

It is understood that assistance shall be granted, in accordance with the law of the requested state, in the investigation or prosecution of criminal offences, including murder, inflicting serious bodily harm, theft, fraud, embezzlement, abuse of official powers or institution to obtain unlawful profits, extortion, blackmail, forgery, counterfeiting of currency, fabrication of false evidence, bribery, knowingly and willingly making fraudulent statements or representations in matters which are within the jurisdiction of any department, agency, or authority of the requesting state, as well as dealing in narcotic drugs and psychotropic substances.

16. Thus the expression “criminal proceedings” in the Exchange of letters includes trial of a person for an offence or a proceeding to determine whether to place a person who is accused of an offence on trial for that offence. The

agreement clearly stipulates that the assistance shall be granted in accordance with law of the requested State in the investigation or prosecution of criminal offence including embezzlement, abuse of official powers or institution to obtain unlawful profits bribery, etc. The agreement further provides that the request of mutual assistance and their enclosures shall be transmitted through diplomatic channels. Thus, the Exchange of letters dated 20th February, 1989 is a binding treaty between India and Switzerland, even applicable for service of summons to compel the presence of a person who is accused of an offence for trial and for determining whether to place such person on trial.

17. In the present case, there is no dispute that the request was made through diplomatic channels and on being received by the Swiss authorities, it was forwarded to FOJ. It may be further noted that FOJ at Berne issued a communication to the Embassy of India at Berne, Switzerland on 7th July, 2011 stating that:

“Service of documents is a formal act of jurisdiction and thus an official act. In accordance with the Exchange of letters the service of summonses has to be communicated by diplomatic channels. It means that the submission of such requests for service must be instigated by the Federal Office of Justice. The Exchange of letters also stipulates that Switzerland demands that all requests for mutual assistance and annexes/ service of documents be accompanied by a translation into one of the official Swiss languages (German, French or Italian) and vice versa in Hindi or English. The requesting authority may further note that English is not an official Swiss language. As the request concerns a firm in a Swiss German speaking canton, the documents have to be provided together with a German translation.

The service of a summons to persons living in Switzerland in order to appear as defendants or witnesses in foreign criminal proceedings is a special type of service. Switzerland requires that summonses for defendants reach the Federal Office of Justice at least thirty days before the date set for their appearance. The Embassy is therefore asked to inform the requesting Indian authority that the documents to be served have to be received by our Office more than 30 days before the hearing. Persons who have been summoned may not suffer legal or material prejudice in either the requesting or the requested state if they do not comply with the summons. Consequently, anyone accepting a summons to appear before a foreign authority is under no obligation to appear abroad. Summonses containing threats of compulsion will not be served. If the summons is unsuccessful, it is still possible via legal assistance channels to request that the person concerned be interviewed. Travel and accommodation expenses, as well as the witness's allowance, must be borne by the requesting state.”

18. Thus the contention of the learned counsel for the Petitioner that it is a Court to Court procedure as envisaged under Section 105 Cr.P.C. and the FOJ at Berne was not competent authority to serve summons on the Petitioner is misconceived. The learned Special Court issued the summons as per the procedure laid down, vide order dated 3rd September, 2011 in conformity with the letter sent by the FOJ.

19. It is an admitted position that the summons have been served on the Petitioner which fact the Petitioner has admitted in its application dated 14th December, 2011 filed before the learned Special Court wherein in para 7 it has been clearly stated that the applicant was delivered the summons dated 3rd September, 2011 issued by the Special Court and other documents. This fact is further fortified in a letter address by the lawyer of the Petitioner to

Swiss authorities dated 9th December, 2011 wherein it has been noted that the proof of delivery to the Indian authorities should be refrained from. Though on the receipt of the first summons, which was sent by the registered post, the contention of the Petitioner before the learned Special Judge was that the service of summons is regulated by the Exchange of letters, on a service made to the Petitioner in terms of the Exchange of letters, the endeavour of the Petitioner is to wriggle out of the same and it is now canvassed that service of summons is not in accordance with law as the service of summons in criminal matters are not regulated by the Exchange of letters.

20. The Petitioner before this Court has strenuously relied upon Federal Act of International Mutual Assistance in Criminal matters (in short IMAC) dated 20th March, 1981, which contemplating the provisions governing the service of summons. According to the learned counsel, Article 68 of the IMAC relates to service of documents and not service of summons which is dealt in Article 69 and thus, Article 68 corresponds to Clause 5 of the Exchange of letters. According to the Petitioner, the parameters of Article 69 which deal with service of summons are excluded in the Exchange of letters and thus, there is no binding treaty between Switzerland and India which deals with service of summons to compel presence. It may be noted that IMAC provides that in case private international agreement do not provide otherwise, this Act shall govern all procedures for International Cooperation in criminal matters, especially in extradition of person who are subject of criminal prosecution or convicted and assistance aimed at supporting criminal proceedings abroad. As per Article 17 read with Article

79 (a) of the IMAC, the Federal office of Justice of the Federal Department of Justice and Police, Switzerland is the designated authority, which is authorized to interact with foreign authorities in the sphere of judicial assistance. Thus, the authority being nominated by the Switzerland will prevail for communication of judicial documents in Switzerland. The use of the word Court, Judge or Magistrate under Section 105 Cr.P.C. not being mandatory would not vitiate the service of summons through the designated agency competent to serve the summons as per Swiss Federal laws and would be a valid service of summons.

21. The issuance of notification as provided for under Section 105 Cr.P.C. is not a mandatory procedure. The word used in Section 105(1)(ii) is 'may'. The non-issuance of the Notification will not render nugatory the binding nature of the Exchange of letters between the two Countries.

22. Thus, I find no force in the contentions raised by the learned counsel for the Petitioner. The Petition and application are dismissed.

(MUKTA GUPTA)
JUDGE

MARCH 05, 2012
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