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

+ **W.P.(CRL) 3558/2017**

REEMA GURUNG

..... Petitioner

Through: Mr. Rishabh Kapur, Adv.

versus

UNION OF INDIA & ANR

..... Respondent

Through: Mr. Ajay Digpaul, CGSC for UOI
Mr. Nikhil Goel & Mr. Ashutosh
Ghade for CBI

CORAM:

HON'BLE MR. JUSTICE VIPIN SANGHI

HON'BLE MR. JUSTICE P.S.TEJI

ORDER

19.12.2017

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Crl. M.A. No. 21056/2017 (Exemption)

Exemption is allowed subject to all just exceptions.

Application stands disposed of.

W.P.(CRL) 3558/2017 & Crl.M.B. No.2243/2017 & Crl.M .A. No. 21055/20017

1. The petitioner has preferred the present writ petition to seek a writ of habeas corpus directing the respondents to release her husband Mr. Gurung Mukhiya from, what is claimed to be, illegal detention. The petitioner states that Gurung Mukhiya presently stands remanded to judicial custody at

Central Jail, Tihar, Delhi. The petitioner also seeks quashing of proceedings under Interpol File No.2017/282686 pending before the learned Additional Chief Metropolitan Magistrate, Patiala House Courts, New Delhi. The petitioner also seeks return of the passport of the detinue and other consequential orders.

2. The petitioner and her husband are Nepalese citizens. The petitioner's husband - Mr. Gurung Mukhiya, it appears, is a convict in a murder case in Nepal and he stands sentenced to life imprisonment in that country. Gurung Mukhiya, it appears, has escaped to India with a view to carry on business.

3. Acting on a red corner notice issued by the Interpol dated 28th November 2017, Gurung Mukhiya was detained on 8th December 2017 and intimation to that effect was sent by the CBI on the same day to the Ministry of External Affairs, New Delhi.

4. On 14th December 2017, an application was moved for issuance of provisional arrest warrant under Section 34B of the Extradition Act, 1962 before the learned Additional Chief Metropolitan Magistrate. On the said date, Gurung Mukhiya was produced before learned ACMM and the order passed in those proceedings shows that Gurung Mukhiya submitted that he wishes to surrender, to be deported back to his country i.e. Nepal, to be tried as per laws of that country. On that basis, the learned ACMM directed the concerned official of Embassy of Nepal to appear in person so that voluntary statement of the detinue with respect to his extradition is recorded. The proceedings were adjourned to 20.12.2017.

5. Contrary to the said stand taken by the detinue, who was represented through counsel as well, the present petition has been preferred.

6. The submission of learned counsel for the petitioner is that the initial arrest/detention of Gurung Mukhiya itself was illegal since there was no request for arrest received from the State of Nepal. The submission is that the request contained in the red corner notice in paragraph 3 with the heading – “*Action to be taken, if traced*” is not sufficient inasmuch as the said request is not from the State of Nepal, but from the Interpol. We may observe that the request contained in the red corner notice is to locate and arrest the fugitive with a view to extradition.

7. Learned counsel for the petitioner submits that under Section 4 of the Extradition Act, 1962, a requisition for the surrender of a fugitive criminal of a foreign State has to be made to the Central Government either by the diplomatic representative of the foreign State at Delhi or by the Government of that foreign State communicating with the Central Government through its diplomatic representative in that State. The submission is that there is no such requisition made by the State of Nepal.

8. On the other hand, the submission of Mr. Digpaul, who appears on advance notice, is that the fugitive Gurung Mukhiya is presently in judicial custody and, consequently, a writ of habeas corpus would not lie.

9. He further submits that under Section 34B, on receipt of an urgent request from the foreign State for the immediate arrest of a fugitive criminal, the Central Government may request the Magistrate having competent jurisdiction to issue a provisional warrant for the arrest of such fugitive criminal and that such fugitive criminal arrested under sub-section (1) of Section 34B could be kept in custody for a period of 60 days, if no request for surrender is received within the said period. The submission is that since

the provisional arrest of the detainee Gurung Mukhiya has taken place only on 8th December 2017, there is still time for the State of Nepal to send its request for the arrest of the detainee.

10. In the face of the statement made by Gurung Mukhiya before the learned ACMM on 14.12.2017 that he wishes to surrender and be deported back to his country, i.e. Nepal to be tried as per laws of that country, in our view the present petition is not maintainable. The submission of learned counsel for petitioner is that when the said statement was made on 14.12.2017, the petitioner and detainee were not aware of the absence of a request for arrest by the State of Nepal. Be that as it may, in case the petitioner or the detainee wish to change their stand, it is for them to approach the learned ACMM before whom the detainee had made his statement on 14.12.2017.

11. Secondly, admittedly, the detainee is presently in judicial custody. It is well-settled position in law that, even if the initial arrest/ detention were to be treated as illegal, if by the time when the writ petition to seek a writ of habeas corpus is heard, the detainee is in judicial custody, a writ of habeas corpus would not lie. The illegality of the detention has to be judged as on the date of return in the writ petition, or on the date on its hearing. Since, as on date, the detention of the detainee cannot be said to be illegal – as he is in judicial custody, the present writ petition would not lie. In this regard, we may refer to our recent decision in *Moin Akhtar Qureshi v. Union of India & Ors.*, W.P. (Crl.) No. 2465/2017 dated 01.12.2017, wherein we had the occasion to deal with the law on the subject in depth.

12. In view of the aforesaid, we find no merit in the present petition. The

same is accordingly, dismissed.

13. A copy of this order be given dasti under signatures of the court master to the learned counsel.

VIPIN SANGHI, J

P.S.TEJI, J

DECEMBER 19, 2017

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