
(2009) 05 CAL CK 0018
In the Calcutta High Court
Case No : C.R.R. No. 3859 of 2008

Narendra Gudgud

APPELLANT

Vs

Central Bureau of Investigation (EOW), Calcutta

RESPONDENT

Date of Decision : 06-05-2009

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 482, 70, 77, 78, 79
Extradition Act, 1962 — Section 19, 36
Penal Code, 1860 (IPC) — Section 120B, 420
Prevention of Corruption Act, 1988 — Section 13(1)(d), 13(2)

Citation : (2009) CriLJ 4278 : (2010) 7 RCR(Criminal) 23

Hon'ble Judges : Partha Sakha Datta, J

Bench : Single Bench

Advocate : Sekhar Basu, Y. Dastoor and Debasish Roy, for the Appellant; Ranjan Roy for C.B.I., for the Respondent

Final Decision : Dismissed

Judgement

Partha Sakha Datta, J.—The petitioner who is an accused in Special Case No. 02 of 2001 u/s 120B read with section 420 of the Indian Penal Code and u/s 13(1) (d) and section 13(2) of the Prevention of Corruption Act, 1988 pending before the learned Judge, 3rd Special Court, CBI at Calcutta resides at New York, USA. Since his appearance could not be secured for his trial the learned Judge, 3rd Special Court, CBI wrote a letter being No. 20 dated 9th March, 2007 to the competent authority, Department of Justice, United States of America through the Secretary, Ministry of External Affairs, Government of India, New Delhi and the Interpol Wing, CBI, Government of India, New Delhi requesting for extradition of the petitioner from USA to India for trial. Against the extradition memo issued by the learned Trial Court, the petitioner made an application before the learned Court for recalling the same. The ground was that extradition memo was based upon issuance of non-bailable warrant of arrest on 17th February, 2006 which was in a form u/s 75 of the Code of Criminal Procedure, 1898. The point was that the form in which warrant was issued relates to the

Criminal Procedure Code, 1898 which has been repealed; the extradition request basing upon the issuance of non-bailable warrant of arrest upon the old Code 1898 was hence illegal. The learned Judge observed that the warrant of arrest was issued by his predecessor upon an old form but that does not vitiate the proceeding as a form cannot defeat justice. The learned Judge further observed that the case was instituted as long back in the year of 1998 culminating in the chargesheet in 2001 but the accused could not be reached as he flew to USA where he is now in jail as per the warrant of arrest issued by the Court.

2. This extradition memo dated 9th March, 2007 and the order dated 16th September, 2008 whereby the learned Judge refused to recall the warrant of arrest are under challenge in this application u/s 482 of the Cr. PC.

3. I have heard Mr. Sekhar Basu, learned Senior advocate appearing with Y.J. Dastoor and Mr. Debasish Roy, learned advocates for the petitioner and Mr. Ranjan Roy, learned advocate appearing for the CBI.

4. The principal contention of Mr. Basu is that in the matter of extradition of an accused who is alleged to have committed an offence in India but is now in the USA the judiciary does not have any role to play. Provisions of the Extradition Act, 1962 and the Extradition Treaty between the USA and India would clearly reveal that the extradition proceedings can only be initiated through diplomatic channels by the Government of India with the Government of the USA and it is absolutely illegal that an Indian Judge in season of the case for trial of an accused would be initiating an extradition proceeding by issuance of warrant of arrest requesting the authority in the Department of Justice in USA for extradition of the offender. Before I was taken to the provisions of the Extradition Act and the Treaty between the USA and India, I have been reminded of the provisions of sections 77, 78 & 79 of the Code of Criminal Procedure, 1973 which relate to execution of warrant of arrest only within the territory of India, and with the aid of sections 77, 78 & 79 of the Cr. PC. it is argued that the Code of Criminal Procedure does not contemplate that an Indian Judge can legally issue warrant of arrest against a person not available in India for execution outside the territory of India. There is no provision in the Criminal Procedure Code entitling the Magistrate or a Judge to issue warrant of arrest for apprehension of an offender who is not available within the territory of India. The learned Judge in the CBI Court had no authority to issue warrant of arrest for its execution outside the territory of India and the extradition proceeding initiated by the learned Judge on the strength of issuance of warrant of arrest is also illegal.

5. Mr. Basu then takes me to different provisions of the Extradition Act, 1962 and pin points section 19 occurring in Chapter IV of the Act:

19. Mode of requisition or form of warrant for the surrender or return to India of accused or convicted person who is in a foreign State.-(1) A requisition for the surrender of a person accused or convicted of an extradition offence committed in India and who is or is suspected to be in any foreign State to which Chapter

III does not apply, may be made by the Central Government-

- (a) to a diplomatic representative of that State at Delhi; or
- (b) to the Government of that State through the diplomatic representative of India in that State;

and if neither of those modes is convenient the requisition shall be made in such other mode as is settled by arrangement made by the Government of India with that State.

(2) A warrant issued by a Magistrate in India for the apprehension of any person who is, or is suspected to be in any [foreign State] to which Chapter III applies shall be in such form as may be prescribed.

6. Then reference has been made to the Extradition Treaty between the Government of the USA and the Government of the Republic of India, Article 2, Article 9, Article 10 and Article 12.

Article 2 relates to the offences which are extraditable and desire reproduced hereunder:

1. An offense shall be an extraditable offenses if it is punishable under the laws both Contracting States by deprivation of liberty, including imprisonment, for a period of more than one year or by a more severe penalty.

2. An offense shall also be an extraditable offense if it consists of an attempt or a conspiracy to commit, aiding or abetting, counseling or procuring the commission of or being an accessory before or after the fact, any offense described in paragraph 1.

3. For the purposes of this Article, an offense shall be an extraditable offense:

(a) whether or not the laws in the Contracting States place the offense within the same category of offenses or described the offense by the same terminology;

(b) whether or not the offense is one for which United States federal law requires the showing of such matters an interstate transportation, or use of the mails or of other facilities affecting interstate or foreign commerce, such matters being merely for the purpose of establishing jurisdiction in a United States federal Court; or

(c) whether or not it relates to taxation or revenue or is one of a purely fiscal character.

4. Extradition shall be granted for an extradition offense regardless of where the act or acts constituting the offense were committed.

5. If extradition has been granted for an extraditable offense, it shall also be granted for any other offense specified in the request, even if the latter offense is punishable by less than one year's deprivation of liberty, provided that all other

requirements for extradition are met."

Article 9 concerns the procedures of extradition and required documents which is reproduced hereunder:-

1. All requests for extradition shall be submitted through the diplomatic channel.
2. All requests for extradition shall be supported by:
 - (a) documents, statements, or other types of information which describe the identity and probable location of the person sought;
 - (b) information describing the facts of the offenses and the procedural history of the case;
 - (c) a statement of the provisions of the law describing the punishment for the offense; and
 - (d) the documents, statements, or other types of information specified in paragraph 3 or paragraph 4 of this Article, as applicable.
3. A request for extradition of a person who is sought for prosecution shall also be supported by:
 - (a) a copy of the warrant or order of arrest, issued by a judge or other competent authority;
 - (b) a copy of the charging document, if any; and
 - (c) such information as would justify the committal for trial of the person if the offense had been committed in the Requested State.
4. A request for extradition relating to a person who has been convicted of the offense for which extradition is sought shall also be supported by:
 - (a) a copy of the judgment of conviction or, if such copy is not available, a statement by a judicial authority that the person has been convicted;
 - (b) information establishing that the person sought is the person to whom the conviction refers;
 - (c) a copy of the sentence imposed, if the person sought has been sentenced, and a statement establishing to what extent the sentence has been carried out; and
 - (d) in the case of a person who has been convicted in absentia, the documents required in paragraph 3.

Article 10 speaks of documents which are admissible for consideration of extradition by the foreign authority. The said Article runs as thus:-

The documents which accompany an extradition request shall be received and admitted as evidence in extradition proceedings if:

(a) in the case of a request from the United States, they are certified by the principal diplomatic or principal consular officer of the Republic of India resident in the United States;

(b) in the case of a request from the Republic of India, they are certified by the principal diplomatic or principal consular officer of the United States resident in the Republic of India, as provided by the extradition laws of the United States; or

(c) they are certified or authenticated in any other manner accepted by the laws in the Requested State.

Lastly, Article 12 relates to provisional arrest which quoted below:-

1. In case of urgency, a Contracting State may request the provisional arrest of the person sought pending presentation of the request for extradition. A request for provisional arrest may be transmitted through the diplomatic channel. The facilities of the International Criminal Police Organisation (Interpol) may be used to transmit such a request.

2. The application for provisional arrest shall contain:

(a) a description of the person sought;

(b) the location of the person sought, if known;

(c) a brief statement of the facts of the case, including, if possible, the time and location of the offense;

(d) a description of the laws violated;

(e) a statement of the existence of a warrant of arrest or a finding of guilt or judgment of conviction against the person sought: and

(f) a statement that a request for extradition for the person sought will follow.

(3) The Requesting State shall be notified without delay of the disposition of its application and the reasons for any denial.

(4) A person who is provisionally arrested may be discharged from custody upon the expiration of sixty (60) days from the date of provisional arrest pursuant to the Treaty if the executing authority of the Requested State has not received the formal request for extradition and the supporting documents required in Article 9.

7. Mr. Basu submits that these articles give out the modalities of extradition which an Indian Judge is not at all concerned with. Thus an Indian Judge is nowhere in the picture in the matter of extradition of an offender from USA to India. Therefore, the entire extradition proceeding initiated by the learned Judge is illegal. My attention has been drawn to the decision in Maganbhai Ishwarbhai Patel etc. Vs. Union of India (UOI) and Another, ; Sudhangshu Mazumdar and Others Vs. Union of India and Others, ; Gramophone Company of India Ltd. Vs. Birendra Bahadur Pandey and Others, These decisions shall be considered in the

sequel.

8. Mr. Ranjan Roy, learned Advocate appearing for the CBI assiduously contested the submissions of Mr. Basu to be without substance. He submits that it cannot be the law that for apprehension of an accused residing in the USA or in any country with which the Government of India is a party to the treaty extradition no warrant can be issued by an Indian Magistrate or Judge and to say that issuance of warrant of arrest is illegal amounts to saying that trial must not be held. For unless an warrant of arrest is issued by an Indian Court legally authorised to hold trial of an accused living in USA, no extradition proceeding can be initiated through diplomatic channel. Therefore, issuance of warrant of arrest is sine qua non of initiation of extradition proceeding. Secondly, it is submitted that, no doubt the extradition proceedings is a matter between Government of India and the Government of the USA and as per the procedure established under the Extradition Act of 1962 and the Treaty executed by and between the two countries the requesting country has to enclose open warrant of arrest which is the basis of the extradition proceeding and all admissible documents to the country requested, and on the basis of the documents referred to above the judicial authority in the country requested is required to dispose of the proceeding and then pass an order upon satisfaction of the existence of materials connecting the offence with the offender. A copy of the letter dated 30th September, 2004 addressed by an officer in the Ministry of External Affairs, New Delhi to the CBI, Economic Offences Wing, a copy of the letter dated 20th June, 2007 addressed by the Joint Secretary (Consular) to the Embassy of India, Washington have been produced. Mr. Roy further has referred to a decision of the Supreme Court in State of West Bengal Vs. Jugal Kishore More and Another, . Mr. Roy further submits that the accused petitioner wrote to the Attorneys at Law at 260 Madison Avenue, New York on 22nd September, 2008 falsely stating that the order relating to extradition proceeding has been revoked or in the process of being revoked by the Ministry of External Affairs at the direction of the Court in India. Mr. Roy submits that this false averment in the letter asking for his release must be taken, exception of because no Court in India has directed revocation of the extradition proceeding.

9. Upon hearing the Learned Counsel for the parties, it must be said at the outset that the proposition stated by Mr. Basu that issuance of warrant of arrest against a person residing in USA by a learned Judge, Special Court, GBI is an illegality has no sanction in the eye of law. The Criminal Procedure Code does not expressly provide that there shall not be issuance of warrant of arrest for apprehension of an offender who committed offence in India punishable under Indian Law but resides in USA. Sections 70 of the Cr. PC. dealing with issuance of warrant of arrest does not make any distinction between warrant of arrest to be executed within India and that outside India. What would be the mode of execution of warrant of arrest issued against a person residing in USA has not been specifically dealt with in Chapter VI of the Cr. PC. Sections 77 & 79 dealt with the mode of warrant of arrest in case of accused persons residing outside

the jurisdiction of the issuing Court. Now the procedure for execution of warrant of arrest against a person residing in a country with which the Government of India has an Extradition Treaty has been dealt with exhaustively in the Extradition Act, 1962 and the Treaty. Provisions of Chapter IV of the Extradition Act, 1962 deals with the mode of requisition or form of warrant for the surrender or return to India of accused or convicted person who is in a foreign state. Section 36 empowers the Central Government to make rules to carry out the purposes of this Act and the Rules provide for the form in which a warrant for apprehension of any person in a foreign state to which Chapter III applies may be issued or the manner in which a warrant may be endorsed or authenticated under the Act. Reading between the lines of different provisions of the Act it does not at all transpire that without issuance of warrant of arrest any extradition proceeding may be initiated or the country asking for return of the offender may request the requested country to extradite the offender to India. That the petitioner is liable to be extradited under the Extradition Act, 1962 in the manner laid down in the Extradition Treaty or in the Rules framed under the Act is not in dispute, It is not in dispute that the offence alleged is one which entitles the Government of India to ask the Government of USA for extradition of the accused. What the learned Judge did is that he requested the competent authority in the Department of Justice, Government of United States of America through the Ministry of External Affairs of the Government of India, New Delhi for extradition of the petitioner for the purpose of trial. Unless the Court in which the trial is pending against the accused inform the Department of Justice, Government of USA through the Ministry of External Affairs, Government of India, New Delhi, the latter cannot commence any formal action to request the requested country for extradition. It is misnomer to argue that the learned Judge directly took up the matter with the Government of the USA. The letter is simply an information to the Government of India as also the Government of the USA drawing the attention of the authorities as aforesaid of the need of extradition of the petitioner so that he could proceed with the trial of the accused. Issuance of warrant of arrest was made long before the said letter was issued. Therefore, the learned Judge did not commit any illegality by writing the extradition memo to the Government of India. The correspondences produced by Mr. Ranjan Roy, learned advocate appearing for the CBI shows that consistent with the provisions of the Extradition Act it is the Ministry of External Affairs that requested the Government of USA through Embassy of India at Washington for extradition of the petitioner. It is profitable to quote the letter dated 20th June, 2007:

MINISTRY OF EXTERNAL AFFAIRS NEW DELHI

P.M. Meena, Joint Secretary (Consular)

Tel 2338-8015; Fax: 2338-8385 T 413/12/2003

June 20, 2007

I am sending herewith a formal request for extradition in respect of Narendra

Gudgud, who is accused in Case Nos. RC-3/E/98 Cal u/s 120B read with 420 of Indian Penal Code and section 13(1)(d) read with 13(2) of Prevention of Corruption Act, 1988. The request has been approved and signed by the Minister of State for External Affairs. The request also enclosed a certificate duly signed by the Minister-Counselor for Consular, the Embassy of United States of America, New Delhi. Is also enclosed with the request.

2. I would be grateful, if the attached documents could be sent to the concerned United States authorities soonest possible for expeditious action at their end. The result of our demarche may please be communicated to us early so that the concerned investigating agency can be informed accordingly.

Yours sincerely

Sd/- (P.M. Meena)

Shri Rahul Rasgotra, Counselor, Embassy of India, Washington

10. Therefore, the letter is quite sufficient to say that with the approval by the Minister of State of External Affairs, the Ministry requested the Government of USA through the Embassy of India for extradition of the petitioner. Earlier on 30th September, 2004, the Ministry of External Affairs returned back the warrant of arrest in original with the request to the CBI, Economic Offenses Wing, to prepare the formal extradition request as per the list of documents enclosed with that letter. Then authority in India complied with the procedure whereafter the Ministry of External Affairs wrote to the Embassy of India in Washington on June 22, 2007 for extradition of the petitioner. Now enclosed with the letter dated September 30, 2004 whereby the documents were sent down to the CBI on the ground that the legal procedures were not adhered, by the Ministry of External Affairs is a copy of the guidelines, paragraph 10 and 11 of which are reproduced below and which would meet the argument of Mr. Basu:

10. A letter/order from the concerned Court justifying accused persons committal for trial on the basis of evidence made available in the chargesheet, with a request to seek his extradition from the country of his present stay.

11. Warrant of arrest should be in original and open dated indicating clearly offenses for which the accused is charged and Court has taken cognizance with relevant sections thereof.

Therefore, neither issuance of letter by the concerned Court requesting to seek for extradition from country of his present stay, nor the issuance of warrant of arrest was illegal. Even Article 9 of the Treaty, Clause 3 expressly says that a request for extradition of a person shall also be supported by a copy of the warrant or order of arrest issued by a Judge or other competent authority and relevant documents. Article 10 provides that in the case of request from the Republic of India the documents are to be certified by the principal diplomatic or Principal Consular Officer of the USA resident in the Republic of India as provided by the extradition laws of the USA. These are extradition procedures between

two Governments: obviously the Judge has no concern with. The concern of the Judge is to issue a request for extradition with warrant of arrest and all documents which would justify prima facie the extradition of an Indian residing in USA at present.

11. The decision in Maganbhai Ishwarbhai Patel (supra) has no manner of application to the facts of the case. Paragraph 25 of the judgment lays down the law that treaty concerns the political rather than the judicial wing of the State. The judicial wing of the State has not directly taken up the matter with the concerned authority in the USA. The facts and circumstances of the case is in relation to the international law concerning boundary disputes between the two countries. The decision in Sudhangshu Mazumdar (supra) decides the question whether treaty making power overrides fundamental rights. It has been laid down that in exercising the sovereign power the treaty-making State is subject to procedural and substantive limitations imposed by its municipal law including statutes and the Constitution of India of the land. The treaty in question between Government of India and the Government of USA cannot be said to be inconsistent with the provisions of the Constitution of India. The other decision in Gramophone Company of India Limited (supra) is a decision in connection with a case under Copyright Act and I do not find the decision has any manner of application. On the other hand, the decision cited by Mr. Roy in State of West Bengal & Anr. vs. Jugal Kishore More (supra) appears to have relevance to the facts of the case. Here the Presidency Magistrate issued a warrant of arrest and sent it to the Secretary of the Home Department for onward transmission to the Government of India for taking further steps for securing presence of accused in India from Hong Kong to undergo trial. It was held that issuance of warrant of arrest was not illegal and even when the provisions of the Extradition Act could not be availed of that did not bar the requisition made by the External Affairs Ministry to the authorities in Hong Kong. It was held that the Chief Presidency Magistrate has the power to issue warrant for the arrest of the fugitive because there was prima facie evidence before him that the said fugitive had committed certain offences which he was competent to try.

12. Accordingly, the petitioner has no case to ventilate. The application is dismissed.

13. Urgent Xerox certified copy, if applied for, be given to the parties as expeditiously as possible.