

POLITISCHE ABTEILUNG II  
s.C.41.129.1.(22). - HC/HSK

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Notiz an die Völkerrechtsdirektion

Bofors

Anlässlich des Weltwirtschaftsforums in Davos liess der indische Premierminister Rao durch seinen Aussenminister Solanki beiliegendes Memorandum (samt Beilage) betreffend Bofors überreichen. Zu diesem Zwecke wünschte Solanki Bundespräsident Felber am 1.2.92 alleine zu sehen.

Sofern wir den Memorandumstext richtig verstehen, geht es darum, dass das in der Schweiz hängige Verfahren nicht weitergeführt werden soll, bis sich der "Delhi High Court" gestützt auf eine vom Angeklagten Chadha Klage über die Rechtmässigkeit des Rechtshilfesuchts an die Schweiz geäussert hat.

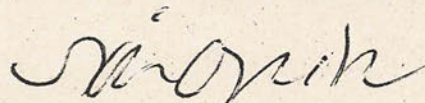
Wir dürfen Sie in diesem Zusammenhang an unsere Notiz vom 19. November 1991 erinnern, mit welcher wir Ihnen uns von den Gebrüdern Hinduja überreichte Papiere zuleiteten. Sie haben damals entschieden, dass letztere nicht den Justizehörden des Kantons Genf weitergeleitet werden sollten, dagegen haben Sie diese Papiere zu Informationszwecken an das BAP gesandt.

Wir wären Ihnen zu Dank verpflichtet, wenn Sie das beiliegende Memorandum einer Ueberprüfung unterziehen und darüber entscheiden wollten, welche Folgen ihm allenfalls gegeben werden sollten.

Rechtfertigt es sich, angesichts des Umstandes, dass uns diesmal das Memorandum von höchster indischer Instanz übergeben wurde, ein anderes Vorgehen (Ueberlassung an die mit dem Fall befassten Gericht(e)?) zu wählen?

Wir bitten Sie, uns über Ihren Entscheid auf dem Laufenden zu halten.

POLITISCHE ABTEILUNG II



Simonin

Beilagen erwähnt (4 Seiten)

Kopie mit Beilagen: - Sekr. BRF  
- Sekr. JAC  
- SI, FMD, HC  
- Schweizer Botschaft New Delhi





2 texts with guide  
 par M. K. E. Pés.  
 So lauki à Pés.  
 BRF. Davos - 1.2.92  
 z 57

Memorandum

The Indian Government has presented a request for mutual assistance to Switzerland on 23rd January, 1990, in the "Bofors" matter.

This request is based on allegations of briberies in the Bofors transaction.

Although an enquiry took place in India, such allegations could not be proven and it has been said that the request for mutual assistance was based on political reasons. These allegations caused the fall of Mr Gandhi's government, although nothing could be established. In Sweden both the government and Bofors have closed the case.

The enquiry opened in India led to several proceedings in India, where the validity and legality of the request for mutual assistance has been challenged before the Indian courts.

This matter is still not resolved in India and one party, Mr Chedha has filed a petition before the Dehli High Court, which will have to decide whether the Indian request for mutual assistance is valid or not under Indian law.

Until a final decision is issued by Indian courts on that issue, no further steps should be taken in Switzerland in this matter.

It has to be noted that in Sweden both Bofors and the Government have closed the case.



In SWEDEN both the company and the government have closed the case and are not willing to pursue it any further. The government has very categorically stated in the Parliament that as far as they are concerned, the matter is closed.

In INDIA, a petition was filed in the Delhi High Court which came up to the Supreme Court where the validity of the Rogatory Commission, and legality of the investigation was challenged. The petition was opposed on the ground that the petitioner who had moved the Court is not an accused in the case and he has no locus standi to file the petition before the Supreme Court. The Swiss government is aware of the fact that the petition is pending in the Supreme Court and the validity of the Letter Rogatory/Rogatory Commission and also the validity of the criminal proceedings was the subject matter challenged in the Supreme Court. On this basis they passed a suspension order that they should await the decision about the validity and legality of the Rogatory from the Indian judicial authorities. It is only on the basis that the Indian judicial authorities are seized about the validity of the Rogatory, the Swiss Court suspended examination of the request for International Judicial Assistance coming from India, till the matter was decided by the Indian judicial authorities.

This was the whole basis, no doubt, that the Supreme Court dismissed the petition on the ground of the locus standi of the petitioner. The Supreme Court said that all the points raised in the petition could only be dealt with and decided if the accused files a petition. Since the petition was a "Public Interest Litigation" it was dismissed with an observation that the accused must come forward. But the Supreme Court did not specifically deal with or answer any of the questions; on the other hand, observed that questions are of great importance and questions of law have arisen.

Subsequent to this, Mr. Win Chadha - one of the accused, filed a petition in the Delhi High Court challenging the illegality and irregularity committed by the C.B.I. The case has been admitted and is coming up for an early hearing. It clearly shows that the court found substance in the allegation that some illegality and irregularity have been committed. While the case is sub-judice and any action or judgement in Switzerland will have a very adverse effect since the case is already pending in the Delhi High Court.

Mr. Win Chadha has raised several other legal issues in his petition under Article 226 of the Constitution of India, before Delhi High Court.



( 2 )

It is one of the conditions of the Mutual Assistance between India and Switzerland that before any assistance is provided the condition of dual criminality must be satisfied. It, therefore, follows that question whether a criminal offence has been committed or not in a particular given case has to be established before an Indian Court as well as before the Swiss judicial authority. The issuance of Letter of Rogatory by the Special Judge has been challenged in the petition under Article 226 of the Constitution of India by one of the persons named in the F.I.R. of the case and the High Court being a superior court of the Special Judge it cannot be assumed by the Swiss Court that the first pre-requisite of criminality in India has been established and that they were free to proceed in the matter without pronouncement on merits the results of the High Court litigation. In case the Swiss authorities overlook this aspect of the matter, it will be in gross violation of the Mutual Assistance in criminal matters. As a matter of fact, every accused has a right to exhaust his all remedies in India before the Rogatory can be acted upon in an outside country (Switzerland).

In this connection, it is necessary to refer to a Judicial pronouncement of a Bench of a High Court in India about the effect of an issue of Rule Nisi in a writ. In FIR 1951 Madras, p. 1044 at 1045 para 3 it has stated as follows:

"We are clear, however, that S 20 applied to this case because we agree with Mr. Ramachandra Rao that the appeal preferred to the Subordinate Judge must be deemed to be pending so long as the application to quash the order is pending in this Court".

In Halsbury's Laws of England, Vol. 9, page 838 (sec 1420), the nature of a writ of certiorari is thus set out:

"The writ of certiorari issues out of a Superior Court is directed to the Judge or other officer of an inferior court of record. It requires that the record of the proceedings in some cause or matter depending before some inferior court shall be transmitted into the Superior Court to be there dealt with, in order to insure that the applicant for the writ may have the more sure and speedy justice"



( 3 )

See also Short and Mellor's Crown Practive (2nd Edn) page 14.

"The Rule Nisi in this case in terms calls upon the Subordinate Judge of Tenali to send for the use of this Court all the records with all things touching the same as fully and perfectly as they have been made by the learned Judge.

It is obvious that the decision in the appeal is again set at large, as it lost its finality the moment this Court issued the Rule Nisi. This Court can on this application for certiorari set aside by quashing the order in the appeal. Surely, in such circumstances, it must be said that the appeal is pending"

Therefore, the matter is still sub-judice and any action or judgement in Switzerland will have a very adverse effect.

The matter can be looked at in two ways:

Suppose, the Swiss Court does not stay the action and goes ahead with the Rogatory, and based on that the investigation proceeds and after this the High Court decides on merits that the Letter Rogatory and the investigations are without jurisdiction and illegal, we cannot put back the clock and undo the mischief that has been done by the order passed by the Swiss Court. On the other hand since there is already a proceeding order of the accounts and if there is already an order by the Swiss Court suspending the proceedings before the Swiss Court no damage will be done by delaying the matter further and if the High Court decides the matter in favour of the petitioner the whole proceedings will be dropped.

On the other hand, if the High Court decides against the petitioner, the whole proceedings can be continued without any damage to any party. So the balance of convenience would lie in favour of continuing the order of suspension.