

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

+ **BAIL APPLN. 1733/2011**

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Reserved on: 24th May, 2012

Decided on: 3rd July, 2012

AMIT MOHAN SINGH

..... Petitioner

Through

Mr. K. Singhal, Mr. Sidharth Mittal,
Mr. Varun Jain, Adv.

versus

UOI

..... Respondent

Through

Mr. A.S. Chandiok, ASG with Ms.
Sapna Chauhan, Mr. Naveen Mata,
Ms. Meenakshi, Advs. for UOI/R-1.
Mr. P.K. Sharma, SC for CBI/R-2
with Mr. Uday Prakash, Mr. Santosh
Prasad, Advs.

Coram:

HON'BLE MS. JUSTICE MUKTA GUPTA

1. By this petition, the Petitioner seeks bail pending the enquiry before the Learned Metropolitan Magistrate under the Extradition Act (in short 'the Act') in regard to LOC No. 2011104148 pursuant to Red Corner Notice No. A1251/2-2011.

2. Learned counsel for the Petitioner contends that the Petitioner is a citizen of United States of America (USA) and his entire family is settled in USA. The Petitioner has been falsely implicated by a girl with whom he was familiar and both of them wanted to marry. The arrest of the Petitioner on 6th July, 2011 is in violation of the Article 21 of the Constitution of India

since the Petitioner has been arrested under a Red Corner Notice and as held by the Hon'ble Supreme Court in *Bhavesh Jayanti Lakhani Vs. State of Maharashtra & Ors.* (2009) 9 SCC 551 a Red Corner Notice is not a warrant of provisional arrest. Thus, in the absence of any provisional arrest, Petitioner's custody was illegal. Further the so-called warrant of provisional arrest was neither issued by a judicial authority nor endorsed by the Central Government. It is contended that till date neither the warrant for provisional arrest has been endorsed by the Central Government nor the extradition Magistrate has issued warrant of arrest. In his application, the Petitioner stated that he was provisionally arrested in view of the facts informed by the Respondents. The Petitioner was kept in dark and no grounds of arrest were informed to him. The Petitioner was arrested on 6th July, 2011 and in terms of Section 34-B(2) of the Extradition Act, the Petitioner could have been kept in custody only for 60 days. He was kept in custody beyond the said period as the documents for extradition from USA were received only on 15th September, 2011. The reply of the Union Government that the documents were received on 19th August, 2011 on the face of it is incorrect. Since there is no provisional warrant of arrest till date, the Petitioner be released on bail. On merits it is contended that the complainant and the Petitioner were on friendly terms. There is no likelihood of the Petitioner absconding and thus bail be granted to him.

3. Learned Additional Solicitor General for the Union of India on the other hand contends that the Petitioner himself in his application for bail admits that he was provisionally arrested on 6th July, 2011 under the provisions of Section 34(B) of the Act. A Red Corner Notice was received

on 23rd February, 2011 which also contained the warrants for provisional arrest. Hence the decision in *Bhavesh Jayanti Lakhani* (supra) is not applicable to the facts of the present case. When the Petitioner was produced before the Learned Metropolitan Magistrate pursuant to his arrest under Section 41(1)(g) Cr.P.C., Kalandra was filed, which contained the documents relating to the look-out circular which had the Red Corner Notice along with the warrant of provisional arrest. Hence, the contention of the learned counsel for the Petitioner that till date warrant of arrest has not been issued is incorrect. The letter of Sh.D.K. Ghosh, Deputy Passport Officer-Extradition, Under Secretary dated 18th July, 2011 addressed to the Assistant Director, CBI- INTERPOL requesting for provisional arrest is only as a matter of abundant caution and does not mean that there was no warrant for provisional arrest. The Learned Magistrate in terms of Section 34-B(2) of the Act immediately informed the Central Government about the arrest of the Petitioner which was duly communicated to the National Central Bureau (NCB) Washington. The Ministry of External Affairs responded through its letter dated 18th July, 2011 forwarding a copy of Note Verbale No. 2011-689/CONS dated 11th July, 2011 requesting for provisional arrest of the Petitioner for the purpose of extradition as there exists an extradition treaty between the two countries.

4. I have heard learned counsel for the parties.

5. The Petitioner was arrested at Indira Gandhi International Airport under Section 41(1) G Cr.P.C. pursuant to a Look Out Circular (LOC) No.2011104148 on the basis of the INTERPOL's Red Corner Notice bearing No.A1251/2-2011. Red Corner Notice was pursuant to a request of USA for

the extradition of the Petitioner, who is a citizen of USA qua offences on count of rape of first degree and second degree in violation of the New York State Penal Law Sections 130.35 and 130.30 entailing a maximum sentence of 25 years and 7 years imprisonment respectively besides sexual abuse and endangering the welfare of a child. A warrant for arrest of the Petitioner was issued by the Supreme Court of County of Nassau in the State of New York on 17th August, 2009. The Petitioner is also wanted for probation violation as he pled guilty on December 21, 2007 and was convicted of attempted criminal possession of a controlled substance in the 5th degree. The Petitioner was sentenced to 5 years probation. The Petitioner violated the condition of his probation when he failed to report to his Probation Officer on two occasions pursuant to directives and refused to provide a urine sample to test for the use of alcohol and controlled substances. The warrant of arrest was accompanied by a certificate of authentication dated 12th August, 2011 by the First Secretary, Mineola, Washington DC.

6. The Red Corner Notice of the requesting country, i.e., the USA was published on 23rd February, 2011 along with the details of the Petitioner's characteristics marks, judicial information, conviction he was facing, arrest warrant and the action to be taken. The Red Corner Notice provided that the same be treated as a formal request for provisional arrest with a further request to apply for provisional arrest in conformity with the National Laws and/or the applicable bilateral and multilateral treaties. The Petitioner was formally arrested while entering the Airport for going to Bangkok by Flight No.7397 on 6th July, 2011 under Section 41(1) G Cr.P.C. and produced before the learned Metropolitan Magistrate. Information in this regard was

given to the Additional Director, Interpole and pursuant thereto a request was made to NCB-Washington DC to send the relevant documents immediately for process of extradition of the Petitioner through proper diplomatic channel. Vide letter dated 18.7.2011 Sh. D.K.Ghosh requested the CBI for provisional arrest of the Petitioner for the purpose of extradition under Article 12 of the Extradition Treaty currently operative between India and USA and 34(b) of the Indian Extradition Act, 1962 (in short, 'the Act') enclosing a copy of Note Verbale No.2011-689/CONs dated 11th July, 2011. This letter of 18th July, 2011 is the bone of contention in the present petition.

7. According to the learned Additional Solicitor General, the Red Corner Notice consists of the provisional arrest warrant duly authenticated and received from the requesting State and thus, this second request for provisional arrest warrant was an idle formality after the Petitioner was arrested on 6th July, 2011 though initially under Section 14(1)(G) Cr.P.C. However, on being produced before the learned Metropolitan Magistrate his remand was given under Section 34(B)(2) of the Act on the basis of the provisional arrest warrant already received with the Red Corner Notice. Counsel for the Petitioner puts it the other way round and states that till 18th July, 2011, the CBI did not even have the provisional warrant of arrest and the Petitioner has not been arrested till date pursuant to a provisional warrant. As the custody of the Petitioner from 6th July, 2011 to 18th July, 2011 and even thereafter is illegal, thus the Petitioner is entitled to be released on bail.

8. Section 41(1)(G) Cr.P.C. gives power to Police to arrest, without an order or warrant from a Magistrate, any person against whom there is a

credible information or reasonable complaint or reasonable suspicion that he has committed an act at any place out of India which if committed in India would have been punishable as an offence and for which he is liable to be apprehended/detained under custody in India under any law for extradition. Since there was Look Out Circular on the basis of Red Corner Notice which contained all the details, prima facie, there was a credible information of the Petitioner having committed an extraditable offence and thus the police officer at Indira Gandhi International Airport was justified in arresting the Petitioner. On being arrested, the Petitioner was produced before the learned Metropolitan Magistrate who remanded him to judicial custody.

9. A perusal of the documents accompanying the Red Corner Notice which have been received through diplomatic channel contained a request for provisional arrest. Thus, prima facie, the requirement of Section 34B(2) of the Act stood satisfied when the Petitioner was remanded to the judicial custody of the learned Metropolitan Magistrate. A further request for provisional arrest made by the Government of USA would not nullify an earlier request for provisional arrest.

10. The Division Bench of this Court in *Ram K. Mahbubani v. Union of India*, 2008(4) JCC2466 held as under:

“27. We do not need to delve further into this question since there is no repugnancy between the Extradition Act or any municipal enactment in the USA on the one hand and the provisions of the Indo-US Treaty on the other. In fact, so far as India is concerned, the position is to the contrary. Section 3(3)(c) of the Extradition Act stipulates that "Where the notified order relates to a treaty State the Central Government

may, by the same or any subsequent notified order, render the application of this Act subject to such modifications, exceptions, conditions and qualifications as may be deemed expedient for implementing the treaty with that State'. In other words, Parliament has delegated the power of modification of the provisions of extradition to the Central Government. This discussion is necessary for the reason that the provisions of Section 34-B (or for that matter Section 16 falling in Chapter-III) does not contain terms empowering the re-arrest of a fugitive criminal after his discharge or release from provisional arrest. In our opinion, the re- arrest of a fugitive criminal is impliedly sanctioned under the Extradition Act. It seems to us that Article 12(5) of the Indo-US Treaty sufficiently empowers the re-arrest of a fugitive criminal after his release from provisional arrest. By operation of Section 3(3)(c) of the Extradition Act the said Article of the Indo-US Treaty assumes the qualities of enforceable law. So far as the position obtaining in the USA is concerned, the provisions of the Indo-US Treaty would override municipal/domestic legislation that may have been previously prevailing in the event of any repugnancy.

29. The starting point of the period prescribed by Section 24 is the date on which the fugitive criminal (Petitioner) has been committed to prison. The Section does not speak of an arrest. Advanced Law Lexicon clarifies the position thus:

'Arrest' and 'commit'. By arrest is to be understood to take the party into custody. To commit is the separate and distinct act of carrying the party to prison, after having taken him into custody by force of the execution'. 'Commit' has been explained in Black's Law Dictionary to connote the sending of a person to prison, and/or directing an officer to take a person to a penal institution. The same Dictionary defines 'arrest' as : a seizure or forcible restraint; the taking or keeping of a person in custody by legal authority especially in response to a criminal charge; the apprehension of someone for the

purpose of securing the administration of the law, especially for bringing that person before a Court. The words are not synonymous to each other. In the case in hand, there was no committal of the Petitioner prior to 18.8.2008, as stands clarified by the Order dated 25.8.2008. If any doubt remains, it would be dispelled by reading further into the Section. The fugitive criminal should have been committed to prison either to await his surrender or for his return to the concerned State. We must revert back to Section 7(4) which empowers the Magistrate to commit the fugitive to prison if the Magistrate is of the opinion that a prima facie case has been made out in support of the requisition of the State concerned. Thereafter, Section 8 speaks of the surrender of the fugitive criminal to the concerned State. Both these Sections are in Chapter-II of the Extradition Act. In those cases where Chapter-III and not Chapter-II is applicable, if upon making the secretarial, punctilious or formal inquiry, as postulated by Section 17, the Magistrate is satisfied that the endorsed Warrant for the apprehension of the fugitive criminal is duly authenticated and that the offence of which the person is accused or has been convicted is an extradition offence, the Magistrate shall commit the fugitive criminal to prison to await his return, presumably to the State concerned. Section 18 clarifies the manner in which the 'return' is to be effected by the Central Government. From this analysis, it is obvious that the words 'surrender' and 'return' are terms of art, having special connotation in the context of the Extradition Act. Our conclusion in the present case is that the prescription contained in Section 24 of the Extradition Act would commence on 18.8.2008 and two months would ordinarily have to be computed from that date.”

11. With regard to binding nature of the INTERPOLE notice, their Lordships in *Bhavesh Jayanti Lakhani (Supra)* held that:

“83. The Ministry of Home Affairs by a Circular Letter dated 18-3-1949 issued to all the State Governments and Union Territories established the Intelligence Bureau as ICPO-Interpol, the National Central Bureau for India. CBI was established as the representative of India for the purpose of correspondence with ICPO-Interpol by reason of a Circular Letter dated 17-10-1966.

84. We have noticed hereinbefore that by a Resolution dated 1-4-1963 the Government of India gave to CBI the powers of investigation of crimes, handled by the Intelligence Bureau of SPE and for participation as NCB in the work connected with Interpol. It is of significance to notice that CBI in its website maintains that it handles all procedures related to extradition and issuance of Interpol notices.

85. We have proceeded on the basis that the power of CBI and its delegated authority, namely, the State police to keep a person under surveillance; arrest him in terms of warrant of arrest issued by a foreign country and red corner notice is an absolute one. Similarly, the power to find out a missing person in terms of the yellow notice is also absolute. However, the question in regard to the necessity of warrant being endorsed or the effect of the red corner notice vis-à-vis the fundamental right of an individual in terms of Article 21 of the Constitution of India as also his right of privacy and the loss of reputation would be dealt with at an appropriate stage.”

96. Extradition of a fugitive criminal from India to any other foreign country, irrespective of the fact as to whether any treaty has been entered into or with that country, is within the exclusive domain of the Central Government. The extradition of a person from India to any other foreign country is covered by the Parliament Act, namely, the Act. Keeping in view the Constitution of Interpol vis-à-vis the resolutions adopted by CBI from time to time, although a red corner notice per se does not give status of a warrant of arrest by a competent court, it is merely a request of the issuing authority to keep surveillance on

him and provisionally or finally arrest the wanted person for extradition.

97. The provisions of the Act and the treaty are required to be given effect to. Whenever a request is received from Interpol the authority must act on behalf of the Central Government. Interpol provides constitution of NCBs by Member States. All members are required to constitute NCBs which should be an authority within the meaning of the provisions of Interpol for coordination of the functioning within the Member States and/or Interpol in case of any request received. Location of a missing person and or tracing the whereabouts of a fugitive criminal is not an easy task. The authority within the meaning of the words of Interpol must act in cooperation with the State police. For the said purpose it may have to request more than one States. A missing person or a fugitive criminal may move from one State to another. In such a case it is not possible for one State to find out the missing person or fugitive criminal.

100. CBI has different roles to play. When it acts as NCB, being a department of CBI, it acts under a treaty. It acts in terms of the Constitution of Interpol. It acts as a authority of the Central Government. By reason of such an act it does not carry out investigation, although it is entitled therefor. It functions as an NCB which is to give effect to the request received from Interpol and/or foreign country. When it does so, indisputably it has to apply its mind. It can take any action only because it is lawful to do so. It does not exercise absolute discretion. It has to act if a case therefor has been made out including the question as whether any extraditable offence has been made out. For the aforementioned purpose it does not Act as an agency within the four corners of the DSPE Act. It acts, it will be a repetition to state, as an authority of the Central Government.

101. CBI, therefore, is entitled to organise and coordinate in regard to the request made by Interpol. It may have to obtain

endorsed warrant. It may have to give provisional warrant in terms of Section 34-B of the Act.”

12. In *Bhavesh Jayanti Lakhani (supra)*, their Lordships were considering the issue of a Red Corner Notice in a matrimonial dispute. Thus, it was held that when the fundamental rights of a person are affected, the Court is bound to interfere in the same and examine whether the offence committed is an extraditable one or not. It may be noted that in *Bhavesh Lakhani (supra)* the accepted position was that no request for extradition of the Appellant therein was made to the Executive Government of India. It was further conceded at the bar that a Red Corner Notice by itself cannot be the basis of arrest or transfer of an Indian citizen to a foreign jurisdiction. It was held that such an arrest can be effected only pursuant to a warrant issued by the Magistrate in view of Section 6, 16 and 34B of the Act or an arrest warrant issued by a foreign country and endorsed by the Central Government under Section 15 of the Act. Further when a request for provisional arrest in terms of Article 12 is communicated it must satisfy the requirement of Section 34B of the Act. Such request from a foreign country must be accompanied by the requisite documents and not a communication alone.

13. Article 12 of the Extradition treaty between USA and India reads as under:

“12.Provisional arrest.-

(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 Organization (Interpol) may be used to transmit such a request.

- (2)The application for provisional arrest shall contain:
- (a)a description of 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 offence;
 - (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 this Treaty if the executive authority of the requested State has not received the formal request for extradition and the supporting documents required in Article 9.
- (5)The fact that the person sought has been discharged from custody pursuant to Para (4) of this article shall not prejudice the subsequent rearrest and extradition of that person if the extradition request and supporting documents are delivered at a later date.”

14. In the present case the Red Corner Notice contained all necessary details as contemplated in Article 12(2) of the Extradition treaty like the photographs, details of identification, likely place of visit, a brief statement of the facts of the cases, the conviction and sentences awarded, a statement of existence of warrant of arrest, action to be taken if traced and request for provisional arrest. Thus the facts of the present case are not akin to that of *Bhavesh Jayanti Lakhani*. I find force in the contention of the learned ASG that the Red Corner Notice contained a request for provisional arrest and the

remand of the Petitioner under Section 34B(2) of the Act after he was produced before the learned Magistrate cannot be faulted.

15. Learned ASG has strongly contended that Article 12 of the Extradition Treaty, having been notified under Section 3 of the Act, entitles the respondents to arrest the Petitioner and said arrest is a provisional arrest under the Extradition Act. Since the treaty between India and USA is notified, its terms get incorporated under the Act in exercise of the powers under Section 3 modifying the Act to that extent and enables provision for arrest to be incorporated in the Act.

16. As regards the contention of the Petitioner that he be granted bail on merits, it may be noted that the extradition of the Petitioner is sought on two counts. Firstly, he violated the terms of probation of five years, escaped during the pendency of the probation and secondly while on probation he allegedly committed an offence of rape and sexual abuse and endangered the welfare of a child. Even on facts, I do not find that it is a case where the Petitioner is entitled to bail.

17. I find no merit in the petition. The petition is dismissed.

(MUKTA GUPTA)
JUDGE

JULY 3, 2012
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