

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

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Reserved on: 31.10.2017

Delivered on: 06.11.2017

+ W.P(CRL) 1633/2017 & CRL.M.A.9059/2017(stay) & 13654/2017 (directions)

PUNEET

..... Petitioner

versus

U O I

..... Respondent

Advocates who appeared in this case:

For the Petitioner : Mr.K.Singhal.

For the Respondent: Mr. Ajay Digpaul, CGSC

CORAM:-

HON'BLE MR JUSTICE ASHUTOSH KUMAR

JUDGMENT

ASHUTOSH KUMAR, J

1. The petitioner, who is facing inquiry under Section 7 of the Indian Extradition Act, 1962 (hereinafter called as 'Act') has challenged the order bearing No.T-413/48/2009 dated 08.06.2000 passed by the Ministry of External Affairs, CPV Division, Extradition Section, New Delhi under the signature of Deputy Passport Officer-Extradition, whereby, on the request of the Government of

Commonwealth of Australia, the Central Government has requested the Additional Chief Metropolitan Magistrate, Patiala House Courts, New Delhi to inquire into the extradition request as to the extraditability of the offences involved by determining whether a prima facie case exists in terms of the Extradition Act, 1962 and other applicable laws.

2. The challenge to the aforesaid order is on the ground that there was no extradition treaty between Government of India and Government of Australia on the date of issuance of the order i.e. on 08.06.2010 and thus the Extradition Act, 1962 had no application and therefore the request to the learned Additional Chief Metropolitan Magistrate by the Central Government for inquiry is illegal and void ab initio.

3. The other ground which has been raised by the petitioner is that at the time of issuance of the order dated 08.06.2010, the arrangement of extradition with Australia which has been published vide notification No.G.S.R. 1381 dated 30.01.1971 (gazette of India extraordinary) does not include the offence of causing death by negligence as provided under Section 304A of the IPC as an

extraditable offence in the second schedule of the unamended Act, 1962 as well as the amended Act of 1993. The last of the grounds of challenge is that it is not clear as to whether the notification of 1971 or the later notification of the Treaty with Australia of the year 2011, have been laid before each house of Parliament, as mandated under Section 35 of the Act.

4. Brief narration of facts which are necessary for deciding the present writ petition is set out as hereunder.

5. The petitioner had gone to Australia, on student visa, in the year 2007. In the year 2008, while driving a vehicle, the petitioner caused injuries to two passersby, leading to death of one of them. The petitioner was taken into custody by the Victorian police. The petitioner is said to have left for India sometimes in August, 2009. The reason for the same has been ascribed to the discriminatory treatment to the petitioner and to other people of Asian origin on racial grounds.

6. A request was made by the Government of Commonwealth of Australia through diplomatic channels for the extradition of the petitioner to the Commonwealth of Australia. Since by virtue of

notification G.S.R. 1381 of 30.08.1971, under the Extradition Act, 1962, both Australia and India have the obligation to cooperate each other in extradition matters in accordance with their laws, the Government of India, acceded to the request of Australia and requested the Additional Chief Metropolitan Magistrate, Delhi to inquire into the case.

7. The order dated 08.06.2010 reads as hereunder:

1. Whereas the fugitive criminal Mr. Puneet PUNEET, is wanted by the Government of the Commonwealth of Australia for prosecution in respect of certain offences.

2. Whereas the Government of the Commonwealth of Australia has submitted an extradition request, through diplomatic channels, for the extradition of the said fugitive criminal to the Commonwealth of Australia; and

3. Whereas by virtue of the Notification G.S.R. 138 of 30th August, 1971, under the Indian Extradition Act, 1962, both Australia and India have the obligation to cooperate each other in extradition matters in accordance with their laws.

4. Therefore, the Government of India i.e. Ministry of External Affairs, having been satisfied on the basis of the material submitted by the Government of the Commonwealth of Australia, that the warrant of arrest was issued by the Magistrate of the State of Victoria heaving lawful authority to issue the same, hereby requests under Section 5 of the Extradition Act 1962 (34 of 1962), the Additional Chief Metropolitan Magistrate (New Delhi), Patiala House Courts, New Delhi, to inquire into the extradition request as to the extraditability of the offences involved, by determining whether a prima facie case exists

in terms of the Extradition Act, 1962, and other applicable laws.

*Deputy Passport Officer-Extradition
(Under Secretary) to the
Government of India”*

8. G.S.R. No.1381 dated 30.08.1971 reads as hereunder:

“MINISTRY OF EXTERNAL AFFAIRS

ORDER

New Delhi, the 30th August 1971

G.S.R. 1381.- In exercise of the powers conferred by sub-section (1) of section 3 of the Extradition Act, 1962 (34 of 1962), the Central Government hereby directs that the provisions of the said Act, other than Chapter III, shall apply to the Commonwealth of Australia with effect from the 30th day of August, 1971.

[No. F.413/1/71.]

*(Dr.) S.P. JAGOTA,
Director (L& T)”*

9. In order to appreciate the contentions of the petitioner, it would be relevant to reproduce the provisions of Sections 3, 4 and 5 of the Indian Extradition Act, 1962 which reads as hereunder:

“3. Application of Act.—[(1) The Central Government may, by notified order, direct that the provisions of this Act other than Chapter III shall apply to such foreign State or part thereof as may be specified in the order.]

(2) The Central Government may, by the same notified order as is referred to in sub-section (1) or any subsequent notified order, restrict such application to fugitive criminals

found, or suspected to be, in such part of India as may be specified in the order.

(3) Where the notified order relates to a treaty State,—

(a) it shall set out in full the extradition treaty with that State;

(b) it shall not remain in force for any period longer than that treaty; and

(c) 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.

(4) Where there is no extradition treaty made by India with any foreign State, the Central Government may, by notified order, treat any Convention to which India and a foreign State are parties, as an extradition treaty made by India with that foreign State providing for extradition in respect of the offences specified in that Convention.

4. Requisition for surrender.- *A requisition for the surrender of a fugitive criminal of a foreign State may be made to the Central Government-*

(a) By a diplomatic representative of the foreign at Delhi;

Or

(b) By the Government of that foreign State communicating with the Central Government through its diplomatic representative in that State or country;

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

5. Order for magisterial inquiry.- *Where such requisition is made, the Central Government may, if it*

thinks fit, issue an order to any Magistrate who would have had jurisdiction to inquire into the offence if it had been an offence committed within the local limits of his jurisdiction directing him to inquire into the case.”

10. A conjoint reading of Sections 3, 4 and 5 of the Act makes it very clear that Section 3 which deals with the applicability of the Act, deals with foreign states/commonwealth countries to which Chapter III of the Act does not apply (Chapter III deals with the return of fugitive criminals to foreign states with extradition arrangements). Under Section 3, the Central Government has to notify that the provisions of the Act, other than Chapter III, shall apply to such foreign state or part thereof as may be specified in the order and where the notified order relates to a treaty state, the full text of the extradition treaty has also to be notified. A requisition for surrender of a fugitive criminal of a foreign state may be made to Central Government and if the Central Government thinks fit, inquiry can be entrusted to any magistrate having jurisdiction to inquire into the offence as if it had been an offence committed within the local limits of his jurisdiction.

11. A “foreign State” as defined under Section 2(e) of the Act means any state outside India and includes every constituent, part, colony or dependency of such State. Similarly, Section 2(d) defines

extradition treaty which means a treaty agreement or arrangement made by India with a foreign state relating to the extradition of fugitive criminals and includes any treaty, agreement or arrangement relating to the extradition of fugitive criminal made on 15th day of August, 1947, which extends to, and is binding on, India.

12. The meaning of the term “foreign State” has in the past undergone a lot of transformation in view of changes in the political status of India since the passing of Indian Extradition Act, 1903. Now, the term “foreign State” has been made clear and simple so far as its application is concerned and in the present Act, it means any country outside India.

13. India has extradition treaties with 28 states namely Belgium, Bhutan, Canada, Hong Kong, Nepal, Netherlands, Russia, Switzerland, USA, UK, UAE, Uzbekistan, Spain, Mongolia, Turkey, Germany, Tunisia, Oman, France, Poland, Korea, Bahrain, Bulgaria, Ukraine, South Africa, Belarus, Kuwait and Mauritius. It has extradition arrangement with 10 states, namely Australia, Fiji, Italy, Papua Guinea, Singapore, Sri Lanka, Sudan, Tanzania, Thailand and Portugal.

14. By virtue of G.S.R. 1381, the provisions of Extradition Act, 1962 had been made applicable to Commonwealth of Australia w.e.f. 30.08.1971. Thus, from the date of publication of the notification vide G.S.R. 1381, though Australia was not a treaty state but had extradition arrangement with the Central Government of India. This extradition arrangement also is considered to be extradition treaty in terms of the definition of extradition treaty in terms of Section 2(d) of the Act.

"2(d) "extradition treaty" means a treaty, agreement or arrangement made by India with a foreign State relating to the extradition of fugitive criminals, and includes any treaty, agreement or arrangement relating to the extradition of fugitive criminals made before the 15th day of August, 1947, which extends to, and is binding on, India. "

15. On 07.03.2011, vide notification bearing No.GSR 192(E), the extradition treaty between Republic of India and Australia was notified. The extradition treaty between India and Australia was signed at Canberra on 23.06.2008 and the treaty entered into force w.e.f. 20.01.2011 in accordance with Article 20.1 of the Treaty (*Article 20.1 - The Contracting States shall inform each other in writing of the completion of their internal procedures required for*

entry into force of this Treaty. The Treaty shall enter into thirty days after the date of the later communication).

16. The extradition treaty between India and Australia referred to above, in Articles 5, 6 and 7 thereof delineate as follows:

“ARTICLE 5

EXTRADITION OF NATIONALS

The nationals of one Contracting State may be extradited to the other Contracting State. If extradition is not granted, the Requested State shall, on the request of the Requesting State, submit the case to its competent authorities for prosecution in accordance with the provisions of this Treaty and the laws of the Requested State.

ARTICLE 6

EXTRADITION AND PROSECUTION

1. *The request for extradition may be refused by the Requested State if the person whose extradition is sought may be tried for the extradition offence in the courts of that State.*

2. *Where the Requested State refuses a request for extradition for the reason set out in paragraph 1 of this Article, it shall submit the case to its competent authorities so that prosecution may be considered. Those authorities shall take their decision in the same manner as in the case of any offence of a serious nature under the law of that State.*

3. *If the competent authorities decide not to prosecute the request for extradition shall be reconsidered in accordance with this Treaty.*

ARTICLE 7
EXTRADITION PROCEDURES

1. *The request for extradition under this Treaty shall be made in writing and communicated through diplomatic channels.*
2. *All documents submitted in support of a request for extradition shall be authenticated in accordance with paragraph 2 of Article 9. Three copies of the request and supporting documents shall also be provided. However, the copies need not be authenticated.*
3. *The request shall be accompanied by:*
 - (a) the details necessary to establish the identity and nationality of the person sought including, where possible, photographs and fingerprints;*
 - (b) a statement of the current location of the person, if known;*
 - (c) a statement of each offence for which extradition is sought;*
 - (d) a statement of the acts and omissions which are alleged against the person in respect of each offence for which extradition is sought;*
 - (e) the text of the laws creating each offence and describing the penalty which may be imposed; and*
 - (f) a statement as to whether there is any limitation in respect of proceedings or punishment.*
4. *If the request relates to an accused person, it must also be accompanied by a warrant of arrest, or a copy thereof, issued by a Judge, Magistrate, or other competent authority in the territory of the Requesting State and such*

documents or other information required by the Requesting State as would reasonably establish that the person sought has committed the offence for which extradition is requested and to establish that the person requested is the person to whom the warrant refers.

5. *If the request relates to a person already convicted and sentenced, it shall also be accompanied by:*

- (a) a certificate of conviction and sentence; and*
- (b) a statement that the sentence is enforceable and how much of the sentence remains to be served.*

6. *If the Requested State considers that the documents or other information supplied for the purposes of this Treaty are not sufficient in order to enable a decision to be taken as to the request, additional documents or other information shall be submitted within such time as the Requested State may require.*

7. *If in any particular case the Requested State so requires, the Requesting State shall supply a translation of any document submitted in accordance with the provisions of this Treaty.”*

17. Article 20 of the treaty further reads as hereunder:

“ARTICLE 20

ENTRY INTO FORCE

1. *The Contracting States shall inform each other in writing of the completion of their internal procedures required for entry into force of this Treaty. The Treaty shall enter into force thirty days after the date of the later communication.*

2. *Either of Contracting States may terminate this Treaty at any time by giving notice to the other through*

diplomatic channels, and if such notice is given the Treaty shall cease to have effect six months after receipt of the notice.

In witness whereof, the undersigned being duly authorized thereto by their respective Governments, have signed this Treaty.

Done in duplicate at Canberra this the twenty third day of June, two thousand and eight, in English and Hindi, both languages being equally authentic. In case of any divergence of interpretation, the English text shall prevail.

Now, therefore, in exercise of the powers conferred by sub-section 1 of Section 3 of the Extradition Act, 1962 (34 of 1962) the Central Government hereby directs that the provisions of the Act, other than Chapter III, shall apply to Australia from the date of the publication of this notification, by repleasing the extradition arrangement between the two countries vide Order G.S.R. 1381 of 30th August, 1971.

(Emphasis provided)"

18. Thus, in exercise of powers conferred by sub-Section (1) of Section 3 of Extradition Act, 1962, Central Government has directed that the provisions of the Act, other than Chapter III shall apply to Australia from the date of publication of the notification dated 07.03.2011 and the extradition arrangement between India and Australia vide order G.S.R. 1381 dated 30.08.1971 shall be replaced by the notification of 07.03.2011.

19. Mr. Singhal, learned counsel for the petitioner has argued that in view of Section 35 of the Extradition Act, 1962, every notified order made or notification issued under the Act shall, as soon as may be, after it is made or issued, be laid before each House of the Parliament. It has further been argued that it is not clear whether the notification of 1971 or of 07.03.2011 which replaces the extradition arrangement with the extradition treaty have been laid before both the Houses of the Parliament.

20. Mr. Ajay Digpaul, learned Central Government Standing Counsel, has on the other hand, submitted that the notification dated 07.03.2011 replaces the treaty arrangements with Australia which came in place by virtue of GSR No.1381 dated 30.08.1971 and thus there was no vacuum and Chapter II squarely applied to the Government of Commonwealth of Australia. With respect to the argument that the aforesaid notifications have not been laid before each House of Parliament in accordance with Section 35 of the Act, Mr.Digpaul has submitted that there is an unclear and ambiguous statement by the petitioner that it has not yet been laid before the Houses of Parliament.

21. It has further been submitted that the treaty arrangement with the Government of Commonwealth of Australia was notified in the year 1971 and the present notification of the treaty is only in the nature of replacement of the 1971 notification of treaty arrangement. In the absence of any distinction now between a treaty arrangement and a treaty, no fault could be found with the application of the Act with the Government of Commonwealth of Australia.

22. Extradition arrangements and extradition treaties are the sovereign functions of the State and are bilateral commitments between two independent nationalities. The Extradition Act, 1962 does not provide for any provision for controlling the extradition treaty arrangement or extradition treaty which can be executed/entered into by the Government of India with any other foreign national. What is actually required to be laid before each House of Parliament under Section 35 of the Act is the notification or any notified order passed under the Act which could be with respect to the application of the Act to such foreign state, with which, either there is treaty arrangement or an extradition treaty as well as other notifications or notified orders under the Act. No time limit also has been provided

under Section 35 of the Act for laying down such notifications before the Houses of Parliament. There is only a caveat that as soon as may be after such notifications are issued, they may be laid before each House of Parliament.

23. The treaty arrangement with Australia which is of the year 1971 has only been replaced by extradition treaty by notification dated 07.03.2011. Thus, the notification of 2011 does not affect the applicability of the Act to the Government of Commonwealth of Australia.

24. The other grounds which have been taken in the writ petition are also not tenable inasmuch as the inquiry under Section 7 of the Extradition Act, 1962 would include the issue of extraditability of the offence for which the petitioner is sought to be extradited. Section 7 of Extradition Act, 1962 makes it very clear that in the inquiry under Section 7 it has to be found whether or not the offences charged against the fugitive is of a political character or it concerns extraditable offence. In case the Magistrate, after inquiry, is of the opinion that a prima facie case is not made out in support of the requisition of Australia, there would be no option for the Magistrate

but to discharge the petitioner. In case, a prima facie case is made out, the report of the Magistrate along with the written statement of the petitioner shall be committed to the Central Government for it to take a decision whether to accept the report and extradite him.

25. Thus, there is no good reason for this court to interfere at this stage when the inquiry against the petitioner is already afoot.

26. For the afore-recorded reasons, the writ petition is dismissed.

Crl. M.A. No.9059/2017 (Stay) & Crl. M.A. No.13654/2017 (directions)

1. In view of the main petition having been dismissed, these applications become infructuous.
2. These applications are disposed of accordingly.

ASHUTOSH KUMAR, J

NOVEMBER 06, 2017

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