

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

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Reserved on: 28.07.2017

Delivered on: 04.08.2017

+ W.P(CRL) 1831/2017

RAJIV CHANDRAKANT SHAH

..... Petitioner

versus

UNION OF INDIA

.... Respondent

Advocates who appeared in this case:

For the Petitioner : Mr.D.N.Ray, Mr.Deepak Gandhi,
Mr.Dhruv Gandhi and Mr.Arhum Sayeed.

For the Respondents : Mr.Ajay Digpaul, CGSC.

CORAM:-

HON'BLE MR JUSTICE ASHUTOSH KUMAR

JUDGMENT

ASHUTOSH KUMAR, J

CrI.M.A.10131/2017 (Exemption)

Exemption allowed subject to all just exceptions.

Application stands disposed of.

W.P(CRL) 1831/2017

1. The petitioner Rajiv Chandrakant Shah by the present writ petition has challenged the order passed after enquiry by the learned ACMM, Patiala House Courts, New Delhi dated 22.04.2017 whereby he has been committed to prison to await the orders of the Central Government for being extradited as well as the order passed by the Ministry of External Affairs, Government of India dated 16.06.2017 whereby the recommendation of learned ACMM referred to above has

been accepted and the Central Government has decided to extradite the petitioner to USA to stand trial before the US District Court for the Eastern District of Wisconsin in case No.00-CR-55 for the offence of bank fraud conspiracy.

2. Pursuant to the requisition made by the Government of United States, the Central Government through the Ministry of External Affairs vide letter dated 19.02.2002 directed for an enquiry under Section 5 of the Indian Extradition Act, 1962 regarding the allegations of commission of certain offences by the petitioner within the territory of United States of America.

3. The petitioner and his brother Sanjiv Chandrakant Shah who were employed in Midwest Mortgage, a mortgage company used their position as officers in the aforesaid company between 01.09.1998 till about beginning of March to commit bank fraud by submitting certain documents to project the offer of their company as more attractive/lucrative. The petitioner and his brother were also alleged to have conspired and transferred approximately 1.2 million dollars from USA to other accounts and in the bank account of one Chaya Shah. The petitioner and his brother were, therefore, alleged to have violated Sections 1344, 371 and 1956 of Title 18 of United States Code.

4. The Grand Jury of the US returned the verdict of indictment, pursuant to which a warrant of arrest was issued against the petitioner on 15.03.2000 by the US District Court, Eastern District, Wisconsin. A Red Corner Notice was issued against the petitioner. Pursuant to the Red Corner Notice, the petitioner was arrested at the immigration counter, IGI Airport in the night intervening between 11.01.2002 and

12.01.2002. It was thereafter that a requisition was received by the Government of India from the US Department of Justice, Criminal Division through their Embassy in New Delhi on 15.01.2002 for the provisional arrest of the petitioner for the purposes of his extradition to United States on the basis of Extradition Treaty between the two countries.

5. During the enquiry under Section 7 of the Extradition Act, 1962, one Sh.D.K.Ghosh proved the documents received from the requesting State to establish prima facie case against the petitioner. The documents were the treaty between India and USA dated 14.09.1999; the indictment orders against the petitioner; the warrant of arrest; the statements by way of affidavit of officials and attorney of Key Bank and other documents related to the Magisterial enquiry against the petitioner. The petitioner was permitted to cross examine aforesaid Sh.D.K.Ghosh and aforesaid Sh.Ghosh was also confronted with various documents. A written statement was also permitted to be filed by the petitioner.

6. In his defence, the petitioner in the aforesaid enquiry argued that the complaints against him namely 00-M-440 and 00-M-441 which pertained to bank fraud were dismissed by the US Court. It was further argued that money laundering was not an offence in India in the year 1999-2000 and, therefore, the charges under the aforesaid head would not fall in the category of extraditable offence.

7. The learned ACMM on going through the materials and arguments made on behalf of the parties held that the offence of money laundering and conspiracy were not extraditable offence.

However, a prima facie case was made out for bank fraud conspiracy which is an extraditable offence for the petitioner to be tried. A recommendation was therefore, made to the Central Government for extradition of the petitioner in case No.00-CR-55 to the United States of America, the requesting State, for facing trial in the US Courts.

8. The aforesaid report of the learned Magistrate was accepted by the Central Government through the Ministry of External Affairs, CPV Division, Extradition section, by order dated 16.06.2017.

9. The petitioner has challenged the enquiry report of the learned Magistrate and the decision of the Central Government on merits. It has been submitted that the petitioner and his brother were the President and Vice President of Midwest Mortgage company, a limited liability company at Wisconsin, which acted as mortgage brokers for borrowers who needed loans secured by real estate from the banks. The function of a mortgage broker, it has been argued, is to help a borrower by placing his loan request along with other related documents to any lending bank for obtaining a mortgage loan for the borrower, for which the mortgage broker gets his commission on the loans obtained. The petitioner, in 1994, after obtaining mortgage banking license, commenced his own mortgage banking along with his brother from 1994. The company floated by the petitioner and his brother was primarily engaged in mortgage banking/brokering business and had dealings with various banks including Key Bank. In about, August, 1999, Key Bank spotted some discrepancies in borrowers credit history report which was received from two sources,

one by Midwest and one through Trans Union, which is one of the major credit reporting agencies in United States of America, directly.

10. On a preliminary enquiry, the report given by Midwest was found to be correct. In that event, the petitioner directed its company to commence investigation and while such investigation was still pending, Key Bank asked the Midwest to buyback all the loans that were sold to them. It has been submitted that a customer may get different scores by different agencies because different methodologies are used by different agencies for according credit rating. Because of the complaint by the Key Bank, there was a FBI search in the premises of the petitioner. The petitioner is said to have cooperated with the FBI investigation and ultimately the matter was settled on 03.01.2000.

11. It has further been stated by the petitioner that on 27.02.2000, the petitioner with his family had come to India to see his ailing father. In his absence from USA, a complaint was lodged by the FBI vide 00-M-440, on which cognizance was taken and a Red Corner Notice in the aforesaid case was issued on 03.03.2000. The petitioner, thereafter was arrested in the night of 11th/12th January, 2002.

12. The petitioner had filed a writ petition No.406/2002 before Delhi High Court seeking quashing of the arrest and grant of bail during the pendency of the writ petition. The petitioner was released on bail vide order dated 03.09.2002 and till 22.04.2017 he remained on bail. The petitioner was taken in custody only by the learned ACMM for his committal to prison for being extradited. It has further been stated that the petitioner gave a detailed representation dated 25.05.2017 to the Central Government which was rejected by order

dated 16.06.2017. The Central Government, through the Ministry of External Affairs accepted the recommendations of the learned ACMM.

13. Sometimes prior to the petitioner making representation before the Central Government and the order accepting the report of the learned ACMM, the petitioner had filed a writ petition bearing No.1293/2017. A Bench of this Court vide order dated 15.05.2017 directed the Central Government to give opportunity to the petitioner of two weeks, in the event of the Central Government taking a decision to extradite the petitioner, to allow him to take recourse to appropriate remedies in law before the appropriate forum, before he is actually transported out of India. It was clarified that the period of two weeks would begin immediately following the day when the order of the Central Government would be served on him.

14. Pursuant to the above direction, the Central Government vide its order dated 16.06.2017, while accepting the report of the enquiry Magistrate, communicated to the petitioner that the order be treated as notice, in terms of the order passed in W.P(C) No.1293/2017. Thereafter, the present writ petition was filed in which there is a prayer for release also. On 28.06.2017, a direction was given that the petitioner be not extradited till consideration of the present writ petition and the same was directed to be listed on 21.07.2017 before this Bench.

15. Though, in the present writ petition, the petitioner has challenged his arrest as being without the due process of law but for the present, the arguments advanced are limited to the correctness of

the inquiry report and the decision of the Central Government to accept such report. However, it would only be appropriate to note the contentions of the petitioner as the illegal arrest of the petitioner has been taken as a ground for challenging the very initiation of inquiry under Section 5 of the Extradition Act, 1962.

16. It has been submitted on behalf of the petitioner that he was arrested in the night of 11th and 12th January, 2012 while he was on a Malaysian Airlines flight. The petitioner had informed the officers that the Red Corner Notice issued on 03.03.2000 in case No.00-M-440 in the USA on the basis of which he was deplaned and arrested was no longer alive as the case had been dismissed on 27.04.2000 by Hon'ble Mr. William E. Callahan, a U.S Magistrate Judge. The petitioner was produced before the ACMM on 14.01.2002 for his judicial custody under Section 41(1) (g) Cr.P.C. On 15.01.2002 he was further remanded to judicial custody by taking into account that Red Corner Notice still subsisted. On 12.02.2002 an application was moved before the learned ACMM by the Union of India that a Red Corner Notice was issued on the request of Washington along with a request for provisional arrest for the purposes of extradition of the petitioner. It was found that the petitioner was arrested under the provisions of the Extradition Act, 1962 and was remanded to judicial custody till 18.02.2002. It was thereafter that an order was issued by the Central Government on 25.02.2002 invoking Section 5 of the Extradition Act, 1962, directing for Magisterial inquiry. It has thus been argued that the arrest of the petitioner was in violation of the provisions of Section 34-B and Section 16 of the Extradition Act, 1962. Be that as it may, it

was further suggested that his arrest should have been shown under the Extradition Act from 12.01.2002 only. The further contention of the petitioner is that the arrest of the petitioner being illegal, the remand too was illegal and that the Magisterial inquiry was vitiated by the fact that a second indictment dated 24.10.2000 was communicated to the Ministry of External Affairs but withholding the information that in the first indictment, the petitioner had fully satisfied all the creditors. Thus, the inquiry having been initiated on the basis of a wrong affidavit filed by US attorney was illegal and unsustainable.

17. In order to appreciate the contention of the petitioner, it would be necessary to refer to certain important provisions of the Extradition Act, 1962.

18. Section 2(3) (c) defines an “extradition offence” as follows:-

*“(i) in relation to a foreign State, being a treaty State, an offence provided for in the extradition treaty with that State;
(ii) in relation to a foreign State other than a treaty State an offence punishable with imprisonment for a term which shall not be less than one year under the laws of India or of a foreign State and includes a composite offence.”*

19. Under Section 4, a requisition for the surrender of a fugitive criminal of foreign State is made to the Central Government either by a diplomatic representative of the foreign State at Delhi or by Government of that foreign State communicating with the Central Government through its diplomatic representative in that country and if neither of these modes are convenient, the requisition can be made in such other mode as is settled by arrangement made by the requesting State with the Government of India.

20. Under Section 5 of the Act, whenever such a 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.

21. Under Section 6 of the Act, on receipt of such an order of the Central Government under Section 5, a Magistrate is required to issue a warrant of arrest of the fugitive criminal.

22. Sections 7 & 8 of the Act read as follows:-

“(7)Procedure before Magistrate.

(1) when the fugitive criminal appears or is brought before the magistrate, the magistrate shall inquire into the case in the same manner and shall have the same jurisdiction and powers, as nearly as may be, as if the case were one triable by a court of session or High Court.

(2) Without prejudice to the generality of the foregoing provisions, the magistrate shall, in particular, take such evidence as may be produced in support of the requisition of the foreign State and on behalf of the fugitive criminal, including any evidence to show that the offence of which the fugitive criminal is accused or has been convicted is an offence of political character or is not an extraditions offence.

(3) If the magistrate is of opinion that a prima facie case is not made out in support of the requisition of the foreign State, he shall discharge the fugitive criminal.

(4) If the magistrate is of opinion that a prima facie case is made out in support of the requisition of the foreign State, he may commit the fugitive criminal to prison to await the orders of the Central Government, and shall report the result of his inquiry to the Central Government, and shall forward together with such report, any written statement which the fugitive criminal may desire to submit for the consideration of the Central Government

8. Surrender of fugitive criminal – *If upon receipt of the report and statement under sub-section (4) of Section 7, the Central Government is of opinion that the fugitive criminal ought to be surrendered, to the foreign State, it may issue a warrant for the custody and removal of the fugitive criminal and for his delivery at a place and to a person to be named in the warrant.*”

23. The Magistrate under Section 7 of the Act is only to make an inquiry and not to hold a trial. Section 7(2) of the Extradition Act provides for taking of such evidence as may be produced in support of the requisition of the foreign State as also on behalf of the fugitive criminal. Thus it is open for a fugitive criminal to show to the Magistrate that the offence alleged to have committed by him is either of a political character or that the offence is not an extraditable offence. He may also show that no case of extradition has been made out even otherwise. In any one of the situation, the Magistrate is required to arrive at a prima facie finding as to whether to accept the defence of the fugitive criminal and discharge him or recommend for his extradition to the Central Government. What is necessary to understand is that no formal trial is needed. Under Section 10 of the Extradition Act, 1962 the exhibits and depositions and official certificates of facts and judicial documents which are authenticated could be received as evidence but the inquiry is only for the limited purpose for forwarding a report to the Central Government whether to accept the request of extradition of the fugitive criminal or not. If the report is otherwise, it is open for the Magistrate to discharge the fugitive criminal.

24. Article 2(a) of the Extradition Treaty has defined extraditable offence as follows:-

1. An offense shall be an extraditable offense if it is punishable under the laws in 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 or an attempt or a conspiracy to commit, aiding or abetting, counselling or procuring the commission of or being an accessory before or after the fact to, 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 I the Contracting States place the offense within the same category of offenses by the same terminology;

(b) whether or not the offense is one for which United States Federal law requires the showing of such matters as 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 note is relates to taxation or revenue or is one of a purely fiscal character.

4. Extradition shall be granted for an extraditable 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 offenses 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.”

25. Thus, under Section 7 of the Extradition Act, 1962 the Magistrate conducting the inquiry is under an obligation to take such

evidence as may be produced in support of the requisition of the foreign State as also on behalf of the fugitive criminal. In such a proceeding, no witness has to be examined for establishing the allegation made in the requisition of a Foreign state. In this context, the word “offence” is required to be considered in the context of the provisions of the Act. The Act confers the jurisdiction and powers on a Magistrate which could be exercised for the purposes of trying an offence but in the extradition proceedings such exercise of power is for the limited purpose of preparing and forwarding of a report.

26. In **Kamlesh Babulal Aggarwal vs. Union of India and Anr,** 2008 (104) DRJ 78, a Division Bench of this Court has held as under:-

“15. In our opinion, the power of the Magistrate in conducting an inquiry under Section 7 of the Act is akin to framing of the charge under Section 228 of the Code of Criminal Procedure, 1973. At the stage of the framing of charge even a strong suspicion founded upon material and presumptive opinion would enable the court in framing a charge against the accused. At that stage, the court possess wider discretion in the exercise of which it can determine the question whether the material on record is such on the basis of which a conviction can be said reasonably to be possible. The requirement of Section 228 also is of a prima facie case. Sufficiency of evidence resulting into conviction is not to be seen at that stage and which will be seen by the trial court. At that stage meticulous consideration of materials is uncalled for. The persons who are not examined by the original investigating agency may be examined by another investigating agency to make the investigation more effective. The materials so obtained could also be used at trial. The court is not required to appreciate the evidence and arrive at the conclusion that the materials produced are sufficient or not for convicting the accused. If the court is satisfied that a prima facie case is made out for proceeding

further, then a charge has to be framed. The sifting of evidence at this stage is permissible only for a limited purpose to find out a prima facie case but the court cannot decide at this stage that the witness is reliable or not. At the stage of framing of charge, evidence is not to be weighed. The court is not to hold an elaborate inquiry at that stage.

16. Section 7 (3) and (4) of the Act in fact require a prima facie case only "in support of requisition". Reading the said provision Along with Section 29, we feel that the ambit of inquiry under Section 7 is in fact narrower than Section 228 Cr.PC and is limited to find that the fugitive is not being targeted for extraneous reasons.

17.This according to us, is the test to be applied in conducting an inquiry under Section 7 of the Act and this is the ambit and scope of the inquiry and no more."

27. Seen in this context, it appears that the learned ACMM found as follows:-

"21. After considering the entire facts, circumstances and material in support of the Extradition Request, I am of the view that the prescribed procedure has been followed in as much as the Extradition request has been submitted through diplomatic channel, along with documents including the duly authenticated and endorsed Arrest Warrants and required information as per the Extradition Act, 1962 and the concerned Extradition Treaty. Thus, I conclude my report with following observations:-

(a) Offence of Bank Fraud conspiracy for which indictment is pending against the FC in Case No.00-CR-55 in the District Court of United States, Eastern District of Wisconsin is an extraditable offence. However, the offence of Money Laundering conspiracy is not an extraditable offence.

(b) The Warrants for the arrest of the fugitive criminal are duly authenticated and endorsed.

(c) There is a prima facie case against the FC for initiating a trial for the offence of bank fraud conspiracy.

In view of my above report, I hereby recommend to Union of India the extradition of the fugitive criminal Rajiv Chander Kant Shah, in Case No. 00-CR-55 to the Requesting State i.e United States of America for facing trial for the offence of bank fraud conspiracy.”

28. Learned counsel appearing for the petitioner has submitted that the learned Magistrate did not take into account the fact that the petitioner was not charged for the offence of bank fraud, rather he was only charged under Section 371 and 1956(h) which are conspiracy to defraud and money laundering. His brother, it has been argued, was additionally charged for 1344 which is an offence of bank fraud. It is submitted that the learned Magistrate clubbed the charges against him and his brother and, therefore, wrongly came to the conclusion that the petitioner be extradited. The other ground of challenge is that the petitioner was committed to prison on 22.04.2017 and the report of the ACMM was accepted on 16.06.2017. It is therefore, submitted that in accordance with the provisions of Section 24 of the Extradition Act, 1962 which commands that if a fugitive criminal has been committed to prison to await his surrender/return to any foreign State is not conveyed out of India within two months of such committal, the High Court on application made to it on behalf of the fugitive criminal and upon proof that reasonable notice of the intention to make such an application has been given to the Central Government, may order such petitioner to be discharged, unless sufficient cause is shown to the contrary. In that case, the petitioner was required to be released as he has not yet been conveyed to the requesting State. It has further been submitted that even if the order dated 28.06.2017 passed by this Court

be taken into account, which actually prevented the petitioner from being extradited, there has been a delay of one day in accepting the report of the learned ACMM by the Central Government for being extradited to the requesting State. A chart showing the calculation of dates provided by the petitioner is being extracted below:-

1. Date of Committal by Ld.ACMM: 22.04.2017
2. Date of Order of the Central Government: 16.06.2017
3. No stay on extradition between 24.07.2017 till 28.07.2017

Days elapsed between 1 and 2	56 days
Days elapsed between 24.07.2017 and 28.07.2017	5 days
Total	61 days

**Therefore, total period elapsed without extradition (A+B):
61 days**

**Total period in custody since committal, till 28.07.2017:
97 days**

29. From the perusal of the records, it appears that when on 16.06.2017, the report of the Magistrate was accepted, a notice was given to the petitioner in terms of the order passed by this Court in W.P (Crl.) No.1293/2017, to allow the petitioner to take recourse to appropriate remedies before he is conveyed/surrendered to the requesting State. It was because of the aforesaid two orders namely the order dated 15.05.2017 passed in W.P(Crl.) No.1293/2017 and interim order dated 28.06.2017 passed in the present writ petition which has prevented the petitioner from being extradited to the requesting State.

30. Thus taking into account the aforesaid facts namely inquiry having been conducted in accordance with law and as mandated under Section 7 and the decision of the Central Government under Section 8,

no interference is required either with respect to the inquiry report of the learned ACMM recommending the extradition of the petitioner or the decision of the Central Government in accepting such report.

31. The prayer, therefore, made in this writ petition for quashing the report as also the decision of the Central Government is rejected.

32. The writ petition is dismissed.

33. However, taking into account the submission of the petitioner that the petitioner participated in the proceedings for about 15 years and has an ailing mother who is 82 years old, this Court directs that the petitioner be given four weeks time to avail himself of appropriate remedies against his extradition before he is extradited to the requesting State, which period of four weeks would run from the date of the pronouncement of this order.

Crl. M.B. No.1128/2017 (Suspension of sentence) & Crl.M.A.10130/2017 (Stay)

1. In view of the main petition having been dismissed, these applications have become infructuous.

2. The applications are disposed of accordingly.

Dasti.

ASHUTOSH KUMAR, J

AUGUST 04, 2017

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