

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

Judgment reserved on: 03.10.2018

% **Judgment delivered on: 08 .01.2019**

+ **W.P.(CRL) NO. 3432/ 2017**

LENNOX JAMES ELLIS

..... Petitioner

Through: Mr. Sumeet Verma, Advocate with
Ms. Preeti Jakhar, Advocate

versus

UNION OF INDIA

..... Respondent

Through: Mr. Rajeev Sharma, Mr. Anuj Handa
and Ms. Radhalakshmi. R, Advocates

CORAM:

HON'BLE MR. JUSTICE VIPIN SANGHI

HON'BLE MR. JUSTICE I.S. MEHTA

J U D G M E N T

VIPIN SANGHI, J.

1. The petitioner has preferred the instant writ petition to seek a writ of certiorari for: (i) quashing the Gazette of India Notified Order No. 580, Part II, Section 3, Sub-Section (i) bearing G.S.R. 811 [E] dated 23rd August 2016, published in the Gazette of India Extraordinary on 23rd August' 2016; (ii) quashing the Extradition Request issued against him by the Department of Justice, Republic of Philippines on 4th August 2016 (iii) quashing the Order T-413/61/2016 dated 24th August' 2016, issued by the Respondent

under Section 5 of the Extradition Act' 1962 seeking an inquiry by the Court of the Ld. Additional Chief Metropolitan Magistrate 01, Patiala House Courts, New Delhi, and; (iv) quashing the extradition proceedings i.e., CC No. 7/4/16, Case No. 44921/16 currently pending before the Court of Learned Additional Chief Metropolitan Magistrate- 01 Patiala House Courts, New Delhi, qua the petitioner. The petitioner also seeks a writ of mandamus, directing his immediate discharge and release.

2. The case of the Petitioner is that he is a British national holding a British Passport. He entered India on 15th January 2016 on a tourist visa, valid for six months. On 08th June 2016, while he was about to leave India from Dabolim Airport, Goa, he was arrested on 9th June, 2016 on the basis of a Red Corner Notice of May, 2016 issued by the Interpol on the request of the Government of the Republic of Philippines. Thereafter, he was remanded to judicial custody on 28.06.2016. On 1st July 2016, the Ministry of External Affairs, Union of India moved a provisional arrest application against the petitioner under section 34B of the Extradition Act' 1962 (hereinafter referred to as 'The Act') before the Ld. ACMM-01, Patiala House Courts, New Delhi, based on which, the petitioner was taken into judicial custody vide order of the Ld. ACMM dated 11th July, 2016. He was brought to Delhi and remanded to judicial custody in Tihar Jail, New Delhi.

3. A request for extradition of the petitioner was received from the Republic of Philippines on 04.08.2016 in the Ministry of External Affairs.

4. On 23rd August, 2016 vide Gazetted Notified Order being GSR 811(E), issued by the Central Government under Section 3(1) read with clause (a) of Sub- Section (3) of Section 3 of the Act, the provisions of the Act were made applicable to the Republic of Philippines, other than Chapter III of the Act. The extradition treaty between India and Philippines was signed at Manila on 12th day of March, 2004 and the Instruments of Ratification of the said Treaty were exchanged at New Delhi on 14th day of October, 2015. Consequently, the aforesaid provisions of the Act were made applicable, retrospectively, from the date when the said treaty was entered into force, in accordance with sub- Article (1) of Article 21 of the said treaty i.e. 14th October 2015.

5. An application dated 27.08.2016 was moved by the respondent Union of India under section 5 of the Act to request the Ld. ACMM to hold an inquiry under the said section. Extradition proceedings being CC No. 7/4/16, Case No. 44921/16 are now pending adjudication in the Court of Ld. Additional Metropolitan Magistrate, Patiala House Courts, New Delhi.

6. The bail applications moved by the petitioner have been dismissed by the Ld. ACMM on 25.02.2017 and on 10.11.2017. The petitioner preferred the present petition in November, 2017. Since learned counsel for the petitioner sought discharge in the matter, on the request of the petitioner, we initially appointed Mr. Badrinath, Advocate, and thereafter, Mr. Sumeet Verma, Advocate to represent him with his consent.

7. We have heard the submissions of Mr. Sumeet Verma and Mr. Rajeev Sharma, Advocates and considered the same.

8. The petitioner's submissions are threefold.

9. Firstly, Id. Counsel for the petitioner, Mr. Sumeet Verma submits that the extradition request, received on 04th August 2016 made by the Republic of Philippines, is liable to be quashed as invalid for the reason that the Act was not made applicable to the Republic of Philippines on the said date. He submits that the Act becomes applicable to a foreign State, only when a Notified Order under section 3(1) of the Act is issued. He submits that the Notified Order with respect to the Republic of Philippines was issued only on 23rd August 2016 i.e. after the receipt of the request for extradition on 4th August, 2016. Thus, the same was invalid. In this regard, he places reliance on the decision in *Marie Emmanuelle Verhoeven v. Union of India*, 2015 SCC Online Del 12166, (hereinafter referred to as *Marie Emmanuelle (1)*) wherein, a Division Bench of this court has held that an extradition request made before the publication of a Notified Order under section 3 (1) of the Act is not valid. He submits that the view of this Court has been affirmed by the Supreme Court in *Marie-Emmanuelle, Verhoeven v. Union of India*, (2016) 6 SCC 456, (hereinafter referred to as *Marie Emmanuelle (2)*)

10. Secondly, Mr. Verma submits that vide the impugned Notified Order No. 580 dated 23rd August 2016, the Act has been made applicable to the Republic of Philippines retrospectively from 14th October 2015. Mr. Verma submits that the Notified Order issued under section 3(1) of the Act is a subordinate/ delegated penal legislation, which must be construed strictly and that it cannot be given retrospective effect from 14th October' 2015. In this regard, reliance is placed on *Transmission Corporation of AP v. Ch. Prabhakar and Ors*, (2004) 5 SCC 551; *Collector of Central Excise*,

Ahmedabad V. Orient Fabrics (P) Ltd., (2004) 1 SCC 597; *Mahabir Vegetable Oils (P) Ltd. v. State of Haryana*, (2006) 3 SCC 620; *State of Rajasthan v. Basant Agrotech (India) Ltd.*, (2013) 15 SCC 1; *Sukhdev Singh v. State of Haryana*, (2013) 2 SCC 212; *CIT v. Vatika Township (P) Ltd.*, (2015) 1 SCC 1,.

11. Thirdly, Id. Counsel for the petitioner submits that the impugned Notified Order dated 23rd August, 2016 has not been laid before either house of the Parliament as mandated by Section 35 of the Act. He submits that the use of the word ‘*shall*’ in Section 35 of the Act shows that the law mandatorily requires a Notified Order issued under section 3(1) of the Act to be laid before each house of the Parliament. Since there is non-compliance of Section 35 of the Act, the Notified Order is ineffective and invalid. Mr. Verma submits that the impugned Notified Order must, therefore, be quashed. Consequently, the magisterial Inquiry under Section 5 is also liable to be quashed.

12. On the other hand, Mr. Rajeev Sharma, Id. Counsel on behalf of the Union of India submits that issuance of a Notified Order under section 3(1) of the Act is not a *sine-qua-non* for a foreign State to make an extradition request and, as such, there is no illegality or infirmity in the extradition request dated 04th August’ 2016 made by the Republic of Philippines. He submits that the Act itself shows that the Central Government is empowered to issue a Notified Order under Section 3(1) of the Act in respect of any “*foreign State*”, which may not even be a “*treaty state*”. Thus, a requisition for surrender of a fugitive criminal may be made to the Central Government

by any foreign State, and not only by a treaty State under Section 4 of the Act.

13. Mr. Sharma submits that the Notified Order under section 3(1) of the Act could be given retrospectivity, as the Act is not a penal statute. It does not create an offence and does not lay down the penalty or sentence for an offence. It merely prescribes the procedural law relating to, inter-alia, extradition of fugitive criminals from India to a foreign State. He refers to the Preamble to the Act which reads: “*An Act to consolidate and amend the law relating to the extradition of fugitive criminals and to provide for matters connected therewith or incidental thereto*”. He submits that so far as penal statutes are concerned, the rule against retrospectivity is only applicable with regard to creation of the offence, the sentence in respect thereof, and not to the procedural laws applicable to penal statutes. Thus, the challenge to the retrospective operation of the impugned Notified Order on the ground that it is a penal statute cannot be sustained. Reliance is placed upon ***Rao Shiv Bahadur Singh and Anr. V. State of Vindhya Pradesh***, AIR 1953 SC 394.

14. Mr. Sharma submits that all that the Notified Order does is to give effect to Article 21(1) of the Treaty signed between the Republic of Philippines and the Indian State. The said Article, insofar as it is relevant, provides: “*This treaty shall be subject to ratification and the instruments of ratification shall be exchanged as soon as possible. It shall enter into force on the date of the exchange of the instruments of ratification.*”. He submits that since the date of exchange of instruments of ratification was 14th

October, 2015, that is the date from which the provisions of the Act have been made applicable to the Republic of Philippines.

15. Mr. Sharma further submits that the Notified Order under section 3 of The Act is a piece of Conditional Legislation which can be given retrospective effect. He further submits that the power to give retrospective effect to the Notified Order under Section 3(1) of the Act flows from section 3(3)(c) of The Act. The Notified Order under Section 3(3)(c) in respect of a treaty State - which the State of Philippines is, can be made “...*subject to such modifications, exceptions, conditions and qualifications as may be deemed expedient for implementing the treaty with that State*”. He submits that the fixing of the date in the Notified Order- from which it would apply, also tantamounts to laying down a condition or qualification for implementation of the treaty with the Treaty State. In support of this plea, he places reliance on *A. Thangal Kunju Musaliar v. M. Venkatachalam Potti*, AIR 1956 SC 246 and *ITC Bhadrachalam Paperboards and Anr. v. Mandal Revenue Officer, AP and ors*, (1996) 6 SCC 634.

16. Lastly, Mr. Sharma submits that section 35 of the Act only casts a public duty on the Central Government, and does not confer any private right on any person. He submits that the duty cast under section 35 is merely directory in nature, since it does not say as to what would be the consequence of the Notified Order not being laid before each house of Parliament and, thus, the impugned Notified Order cannot be quashed on the ground that the same has not been laid before the two houses of Parliament.

17. We have considered the rival submissions of the parties in the light of the law including the several decisions relied upon by them.

18. At the outset, we may state that though the petitioner has raised the issue in the writ petition— that he was entitled to be discharged upon the expiration of 60 days from the date of his provisional arrest under Section 34-B, since no request for his surrender or return was received within that period, we are not inclined to examine the said submission, considering the fact that the petitioner is in judicial custody presently, and a writ petition to seek a writ of *Habeas Corpus* would not lie in respect of a detenue who is in judicial custody. It is the nature and status of present detention of the petitioner with which we are concerned. Even if it were to be accepted for the sake of argument, that his detention may not have been valid for a certain period earlier, that would not be a ground to quash his detention and direct his release, if he is now in legal custody. In this regard, we may refer to our decision in *Moin Akhtar Qureshi v. Union of India & Ors.*, 2017 SCC Online Del 12108 wherein we have, in depth, discussed the law on the subject as laid down by the Supreme Court and by this Court.

19. We proceed to deal with the primary submission of the petitioner that extradition request made by the Republic of Philippines is invalid on the ground that it was made before the issuance of the Notified Order under section 3(1) and 3(3)(a) of the Act. The petitioner has argued that since the extradition request against him was received on 04.08.2016 i.e., before 23rd August' 2016- when the Notified Order under section 3(1) and 3(3)(a) of the Act was issued, as on 04.08.2016, the provisions of the Act were not applicable to the Republic of Philippines. In this regard, Id. Counsel for the

petitioner has placed heavy reliance on the decision in *Marie Emmanuelle (I)* (Supra), wherein, a Division Bench of this court held that an extradition request made by a foreign State before the publication of a Notified Order under section 3(1) of the Act (making the Act applicable to that foreign State) is not a valid extradition request. Consequently, the magisterial inquiry under Section 5 of the Act, initiated on the basis of the prior request was invalidated. It was further held that the extradition request dated 24.03.2015 made by the Republic of Chile could not be said to have been validated by virtue of a subsequent notification/ Notified Order dated 28.04.2015. The Division- Bench observed:

“71. On a combined reading of Sections 4 and 5 of the Act, it is clear that the order of the Central Government for Magisterial Inquiry into the extraditability of the offence committed by the fugitive criminal would follow upon a request for extradition received from the foreign State concerned. Thus, the proceedings for extradition would be set in motion with a request made by the foreign State concerned under Section 4 of the Act.

72. In the present case, such extradition request under Section 4 of the Act was made by the Republic of Chile through its Embassy on 24.03.2015. However, the fact remains that by that date the provisions of the Extradition Act were not made applicable to the Republic of Chile since the notification under sub-Section (1) read with sub-Section (3) of Section 3 came to be published only on 29.04.2015. We have already held that by virtue of the said notification dated 28.04.2015 published in the Gazette of India dated 29.04.2015, the provisions of the Act are made applicable to the Republic of Chile w.e.f. 29.04.2015 only. That being so, we are of the view that the extradition request dated 24.03.2015 cannot be treated as a requisition for surrender in terms of Section 4 of the Act. In other words, a request made on or after 29.04.2015 can only be acted upon

for directing Magisterial Inquiry into the extraditability of the alleged offence committed by the petitioner in Chile. Therefore, we are of the view that the first respondent had erred in passing the order dated 18.05.2015 directing Magisterial Inquiry accepting the extradition request dated 24.03.2015 of the Republic of Chile. The fact that the provisions of the Act are made applicable subsequently to the Republic of Chile by notification dated 28.04.2015 published in terms of Section 3(1) of the Act, in our considered opinion, is of no consequence. The extradition request dated 24.03.2015 cannot be held to have been validated by virtue of the subsequent notification dated 28.04.2015.” (emphasis supplied)

20. Firstly, we may observe that a perusal of the judgment of the Supreme Court in *Marie Emmanuelle (2)* (supra) shows that the Supreme Court has not affirmed the said view of this Court- that an extradition request made by a Foreign State prior to issuance of the Notified Order under Section 3(1) of the Act, would be an invalid request. On the said aspect, there is no express view of the Supreme Court since, the occasion to express the said view did not arise in the facts of that case. The Division Bench of this court observed that the respondents were not precluded from initiating fresh proceedings for extradition of the petitioner in that case by following the due process of law. In terms of the said liberty granted in the judgment, as a matter of fact, a fresh requisition was received from the Republic of Chile for extradition of the petitioner in that case. The petitioner had, therefore, approached the Supreme Court, inter alia, with the plea that there was no binding extradition treaty in terms of Section 2(d) of the Act between India and Chile. Another plea raised before the Supreme Court was that the requisition made by the Republic of Chile, invoking the principle of reciprocity and the general principles of international law, for extraditing the petitioner from India was

not maintainable. The Supreme Court did not accept either of the aforesaid submissions of the petitioner. The conclusions summarized in the opening paras 2 and 3 of the judgment read as follows:

“ 2. The principal question for consideration is whether there is a binding extradition treaty in terms of Section 2(d) of the Extradition Act, 1962 between India and Chile. Our answer to this question is in the affirmative.

3. The subsidiary question, equally important, is assuming there is no binding extradition treaty between India and Chile, whether a requisition by Chile invoking the principle of reciprocity and the general principles of international law for extraditing the petitioner from India is maintainable. In our opinion, the general principles of international law do not debar the requisition. However, whether the petitioner ought to be extradited or not is a decision that the Magistrate concerned, before whom the extradition proceedings are pending, will need to take on the evidence and material before him.”

21. Since the Judgment of the Division Bench of this Court had worked itself out, the occasion for the Supreme Court to consider the correctness of the view taken by this Court on the aspect: whether the request for Extradition/ *Note verbale* received from the Republic of Chile prior to the issuance of the Notified Order was valid, or not, did not arise for consideration before the Supreme Court. In fact, a perusal of the judgment of the Supreme Court shows that the Supreme Court has, while answering the subsidiary question, negated the foundation on which the High Court proceeded to return its aforesaid finding that an extradition request/ *Note Verbale* could be only one made under the Act by a treaty State, and not otherwise. The discussion before the Supreme Court proceeded on an

entirely different footing, since, a fresh request for extradition/ *Note verbale* had been received after the decision of this Court was rendered on 21.09.2015.

22. Thus, we cannot agree with the learned counsel for the petitioner that the view expressed by this Court has been affirmed by the Supreme Court on the aspect that if the request for Extradition/ *Note- verbale* is received prior to the issuance of the Notified Order under Section 3(1) by the Central Government in respect of the foreign State which issues such request for Extradition/ *Note verbale*, the same is invalid.

23. In the present case, the Notified Order dated 23.08.2016 makes the provisions of the Act applicable to the Republic of Philippines (except Chapter III) from the date of entry into force of the Treaty between the two Sovereign States which, the Notified Order itself notes, as 14th Day of October 2015. Article 21 of the said Extradition Treaty between Republic of India and Republic of Philippines provides that the Treaty shall enter into force on the date of the exchange of instrument of ratification.

24. Thus, though the Notified Order under Section 3(1) and 3(3)(a) was issued in the present case on 23.08.2016, the provisions of the Act apply to the Republic of Philippines with effect from 14.10.2015 i.e. from a retrospective date. The effect of the said retrospective application would be, that the provisions of the Act would be deemed to apply to the Republic of Philippines from 14.10.2015. Thus, for all intents and purposes— by force of a legal fiction created by the deeming clause, it shall be deemed that on the date when the request for extradition/ *Note- verbale* was received from the

Republic of Philippines i.e. on 04.08.2016, the provisions of the Act were already applicable to the Republic of Philippines.

25. In *State of Bombay v. Pandurang Vinayak Chaphalkar*, AIR 1953 SC 244, the Supreme Court has explained the effect of the law deeming the existence of a particular fact situation. The Supreme Court in *Pandurang Vinayak Chaphalkar* (Supra) held as follows:

“5.

When a statute enacts that something shall be deemed to have been done, which in fact and truth was not done, the court is entitled and bound to ascertain for what purposes and between what persons the statutory fiction is to be resorted to and full effect must be given to the statutory fiction and it should be carried to its logical conclusion. [vide Lord Justice James in Ex parte Walton: In re Levy [17 Ch Div 746, at p. 756] . If the purpose of the statutory fiction mentioned in Section 15 is kept in view, then it follows that the purpose of that fiction would be completely defeated if the notification was construed in the literal manner in which it has been construed by the High Court. In East End Dwellings Co. Ltd. v. Finsbury Borough Council [1952 AC 109] ,) Lord Asquith while dealing with the provisions of the Town and County Planning Act, 1947, made reference to the same principle and observed as follows:

“If you are bidden to treat an imaginary state of affairs as real, you must surely, unless prohibited from doing so, also imagine as real the consequences and incidents which, if the putative, state of affairs had in fact existed, must inevitably have flowed from or accompanied it ... The statute says that you must imagine a certain state of affairs; it does not say that having done so, you must cause or permit your imagination to

boggle when it comes to the inevitable corollaries of that state of affairs.” (emphasis supplied)”

26. Thus, unless the petitioner succeeds in his submission that the Central Government could not have issued the Notified Order directing that the provisions of the Act would be applicable to the Republic of Philippines from a retrospective date i.e the date of entry into force of the said Treaty – which happens to be 14th Day of October 2015, the petitioner cannot, in any event, rely on the findings returned by this Court in *Marie Emmanuelle* (1) (supra).

27. We may now proceed to consider the primary submission of the petitioner that the Notified Order issued under Section 3(1) of the Act could not be given retrospective effect.

28. Ld. counsel for the petitioner has argued that the Act is a penal statute and, as such, cannot be given retrospective effect. On the other hand, Mr. Sharma has contended that the Act is not a penal statute, as it primarily provides for the procedure to be adopted to extradite a fugitive criminal to a foreign State. He submits that the Act does not create an offence; or prescribe the punishment for any offence. Thus, the Notified Order could be given retrospective effect. Mr. Sharma has further submitted that the Notified Order under Section 3(1) of the Act is a piece of Conditional Legislation, which can be given retrospective operation.

29. A penal statute is one which creates offence(s), and which provides for the punishment/ sentence for such offences. Statutes which create offences and provide for the punishment(s)/ sentencing for such offences

have to be construed strictly, and will only have prospective operation in view of the Constitutional protection granted by Article 20(1) thereof. It has been held in a catena of judgments that penal statutes have to be construed strictly and that they cannot have retrospective operation. (See: ***Collector of Central Excise, Ahmedabad*** (Supra); ***Transmission Corporation of AP*** (Supra) and ***Rao Shiv Bahadur*** (Supra).

30. On the other hand, it is well settled that a statute which merely prescribed, inter alia, the procedure is presumed to be retrospective, unless such construction is textually inadmissible. (See, ***Hitendra Vishnu Thakur v. State of Maharashtra***, (1994) 4 SCC 602).

31. At this stage, we may take note of the relevant provisions of the Act.

32. “***Extradition Treaty***” is defined in Section 2(d) to mean “*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;*”.

33. “***Foreign State***” is defined in Section 2(e) to mean “*any State outside India, and includes every constituent part, colony or dependency of such State;*”.

34. “***Fugitive criminals***” means “*a person who is accused or convicted of an extradition offence within the jurisdiction of a foreign State and includes a person who, while in India, conspires, attempts to commit or*

incites or participates as an accomplice in the commission of an extradition offence in a foreign State.”.

35. “**Notified order**” means an order notified in the official gazette.

36. “**Treaty State**” means the foreign State with which an extradition treaty is in operation.

37. Section 3 of the Act lays down the mechanism by which the provisions of the Act may be made applicable to a foreign State by the Central Government by issuance of a notified order. The said section reads as follows:

*“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 subsection (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.”

38. Section 4, which falls in Chapter II on the subject of “***Extradition of fugitive criminals to foreign States to which Chapter-III does not apply***” deals with requisition for surrender. The same reads as follows:

“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 State 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 the Government of India.”

39. Section 5 empowers the Central Government to issue an order for conduct of a magisterial inquiry when requisition for surrender of fugitive criminal to a foreign State is made to the Central Government. The same reads as follows:

“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.”

40. Sections 6 to 10 – which also fall in Chapter-II, deal with the steps to be taken and the procedure to be followed upon an order being issued by the Central Government to a Magistrate to hold a magisterial inquiry.

41. Section 11 states that “*Nothing contained in Chapter-II shall apply to fugitive criminals to which Chapter-III applies*”. Chapter-III deals with the subject “***Return of fugitive criminals to foreign States with extradition arrangements***”.

42. Section 12 – which falls in Chapter III, reads as follows:

“12. Application of Chapter.- (1) *This Chapter shall apply only to any such foreign state to which, by reason of an extradition arrangement entered into with that State, it may seem expedient to the Central Government to apply the same.*

(2) *Every such application shall be by notified order, and the Central Government may, by the same or any subsequent notified order, direct that this Chapter and Chapters I, IV and V shall, in relation to any such foreign state, apply subject to such modifications, exceptions, conditions and qualifications as it may think fit to specify in the order for the purpose of implementing the arrangement.”*

43. We may observe that application of Chapter III stands excluded by the impugned Notified Order.

44. Sections 13 to 18 (which also fall in Chapter III) deal with the procedure to be followed in the matter of extradition of a fugitive criminal to a foreign State with extradition arrangement.

45. Chapter-IV deals with the subject of **“Surrender or Return of accused or convicted persons from Foreign State.”**

46. Chapter-IV contains the miscellaneous provisions.

47. Section 26 states that *“A fugitive criminal who is accused or convicted of abetting, conspiring, attempting to commit, inciting or participating as an accomplice in the commission of any extradition offence shall be deemed for the purposes of this Act to be accused or convicted of having committed such offence and shall be liable to be arrested and surrendered accordingly.”*

48. Section 31 of the Act provides the safeguards against extradition of a fugitive criminal. The said section reads as follows:

“31. Restrictions on surrender.— (1) A fugitive criminal shall not be surrendered or returned to a foreign State

(a) if the offence in respect of which his surrender is sought is of a political character or if he proves to the satisfaction of the magistrate or court before whom he may be produced or of the Central Government that the requisition or warrant for his surrender has, in fact, been made with a view to try or punish him for an offence of a political character;

(b) if prosecution for the offence in respect of which his surrender is sought is according to the law of that State barred by time;

(c) unless provision is made by that law of the foreign State or in the extradition treaty with the foreign State that the fugitive criminal shall not be determined or tried in that State for an offence other than—

(i) the extradition offence in relation to which he is to be surrendered or returned;

(ii) any lesser offence disclosed by the facts proved for the purposes of securing his surrender or return other than an offence in relation to which an order for his surrender or return could not be lawfully made; or

(iii) the offence in respect of which the Central Government has given its consent;

(d) if he has been accused of some offence in India, not being the offence for which his surrender or return is sought, or is undergoing sentence under any conviction in India until after he has been discharged, whether by acquittal or on expiration of his sentence or otherwise;

(e) until after the expiration of fifteen days from the date of his being committed to prison by the magistrate.

(2) For the purposes of sub-section (1), the offence specified in the Schedule shall not be regarded as offences of a political character.

(3) The Central Government having regard to the extradition treaty made by India with any foreign State may, by notified order, add or omit any offence from the list given in the Schedule.”

49. Section 34B which falls in Chapter-V provides for provisional arrest.

The same reads as follows:

“34B. Provisional arrest. *(1) On receipt of an urgent request from a foreign State for the immediate arrest of a fugitive criminal, the Central Government may request the Magistrate*

having competent jurisdiction to issue a provisional warrant for the arrest of such fugitive criminal.

(2) A fugitive criminal arrested under sub-section (1) shall be discharged upon the expiration of sixty days from the date of his arrest if no request for his surrender or return is received within the said period.”

50. Section 35 provides that 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 Parliament.

51. Section 36 contains the rule making power of the Central Government to carry out the purpose of the Act. Section 36(2) without prejudice to the generality of the rule making power contained in sub-Section(1), particularises the matters in respect whereof rules may be made. Section 37 is the repeal and saving provision.

52. The Schedule to the Act referred to in Section 31(2) enlists the offences which are not to be regarded as offences of Political Character.

53. Extradition of a fugitive criminal to a Foreign State is an executive decision of the State, taken in exercise of the Sovereign Power of the State. Extradition is the surrender of a criminal fugitive by one State to another in which the criminal fugitive is liable to be punished, or has been convicted. When a requisition for surrender of a fugitive criminal is received from a Foreign State – whether or not it is a Treaty State, the rights of the fugitive criminal to be subjected to a Magisterial inquiry are preserved, wherein the Magistrate shall examine, inter-alia, whether the fugitive criminal is accused or convicted of an offence of a political character, and whether the offence

is, or is not, an extradition offence. He shall conduct the inquiry in terms of Section 7 and 31 of the Act. The law of extradition is based on the broad principle that it is in the interests of all nations that crimes recognized as such by the civilized world should not go unpunished (See, Definition contained in *Delhi High Court Rules, Volume III Chapter 16 : Extradition and Foreign Jurisdiction (Criminal Courts)*). Extradition of A fugitive criminal may be undertaken in pursuance of a signed and ratified treaty, or even when such a treaty does not exist. The signing of an extradition treaty, or any other treaty between two or more sovereign nation States is an executive act, whereas, the act of ratification i.e., implementation of such a treaty, is a legislative function. It is the municipal law of the State which lays down the procedure to be followed, inter alia, for the purpose of conduct of the inquiry. The Act is that municipal law in India. The purpose of such an inquiry – which is not a trial, is not to decide the innocence or guilt of the fugitive criminal. The main purpose of the enquiry is to determine whether there is a *prima facie* case, or reasonable ground which warrants the fugitive criminal being sent to the demanding State. Merely because the Act provides for issuance of warrant for arrest of the fugitive criminal in respect of whom an Order for conduct of a Magisterial inquiry is issued under Section 6 of the Act, and the criminal fugitive is taken into custody, is no reason to consider the Act – or any provision thereof as a penal statute. The arrest of the fugitive criminal is not punitive. The whole purpose is to apprehend or prevent the further escape of the person – who is accused of certain offences and/ or is convicted and wanted by the requesting State for trial or for undergoing the sentence passed or to be passed. (See *Nina Pillai, SMT v. Union of India*, 1997 Cr L.J. 2358].

54. A perusal of the entire scheme of the Act shows that the Act primarily provides for the procedure to be followed while dealing with an extradition request received from a Foreign State in respect of a fugitive criminal. The Act, inter-alia, contains the procedure for making the provisions of the Act applicable to a Foreign State; the procedure to initiate a magisterial inquiry; the procedure applicable for conduct of the magisterial inquiry etc. - none of which provide for creation of an offence; or for conviction for such an offence, or; for sentencing/ punishment. Even Section 26 – which we have quoted hereinabove, is only classificatory and does not create an offence by itself.

55. Thus clearly, the Act is a procedural statute, and not a penal statute.

56. The Supreme Court has gone so far as to say that a statute which does not provide for punishment, but merely lays down the procedure for trying criminal offences may not be construed strictly. See ***Iqbal Singh Marwah v. Meenakshi Marwah***, (2005) 4 SCC 370. In this case, the Supreme Court rejected the contention of the appellant that the Code of Criminal Procedure is a penal statute, because it provides for the trial of criminal offences. The court explained as to what is the meaning of a penal statute, and held that Cr.P.C is not a penal statute and further observed:

“31. That apart, the section which we are required to interpret is not a penal provision but is part of a procedural law, namely, the Code of Criminal Procedure which elaborately gives the procedure for trial of criminal cases. The provision only creates a bar against taking cognizance of an offence in certain specified situations except upon complaint by court. A penal statute is one upon which an action for penalties can be brought by a public officer or by a person aggrieved and a

penal Act in its wider sense includes every statute creating an offence against the State, whatever is the character of the penalty for the offence. The principle that a penal statute should be strictly construed, as projected by the learned counsel for the appellants can, therefore, have no application here.” (emphasis supplied)”

57. However, in *Maruram v. Union of India*, (1981) 1 SCC 107, the Supreme Court dealt with the exceptional situation involving Section 433A of the Cr PC which restricted the power of remission or commutation in certain cases. This section was brought into force on 18.12.1978 by Act 45 of 1978. Though the said section is contained in an otherwise procedural statute i.e. the Cr PC, the Supreme Court held that, since the provision expressly provides for sentencing, it is a penal provision and thus, cannot have retrospective operation. The Supreme Court observed:

“(7) We declare that Section 433-A, in both its limbs (i.e. both types of life imprisonment specified in it), is prospective in effect. To put the position beyond doubt, we direct that the mandatory minimum of 14 years actual imprisonment will not operate against those whose cases were decided by the trial court before December 18, 1978 when Section 433-A came into force. All “Lifers” whose conviction by the court of first instance was entered prior to that date are entitled to consideration by Government for release on the strength of earned remissions although a release can take place only if Government makes an order to that effect. To this extent the battle of the tenses is won by the prisoners. It follows, by the same logic, that short-sentencing legislations, if any, will entitle a prisoner to claim release thereunder if his conviction by the court of first instance was before Section 433-A was brought into effect.” (emphasis supplied)”

58. In the present case, the Act does not lay down the procedure for trial of a municipal offence. It primarily lays down the procedure to be adopted

while dealing with a request for extradition made by a Foreign State. Thus, the contention of the petitioner that the Act is a penal statute is devoid of any merit. The Central Government is not *per se* barred from giving retrospective effect to the Notified Order- on that count.

59. We now proceed to consider the aspect whether the Notified Order is a piece of Delegated Legislation, or Conditional Legislation. Conditional and Delegated Legislations belong to different species of Subordinate legislations. In the case of a Delegated Legislation, the power to legislate (normally to fill in the gaps and make the policy of law contained in the parent legislation workable) is given by the legislative body to an outside authority - normally the executive wing of the State, whereas, in the case of a Conditional Legislation, the Legislation is complete in itself, but its operation is made dependant on fulfillment of certain conditions, and what is delegated by the Legislative Authority to an outside authority. (normally the executive wing of the State), is the power to determine, according to its own judgment, whether or not those conditions are fulfilled.

60. In *In re Art. 143, Constitution of India and Delhi Laws Act (1912) etc.*, AIR 1951 SC 332, the Supreme Court has elaborately considered the two kinds of subordinate legislations i.e. Conditional Legislation and Delegated Legislation. The following passages from the judgment is highly instructive:

“236. Broadly speaking, the question of delegated legislation has come up for consideration before courts of law in two distinct classes of cases. One of these classes comprises what is known as cases of “conditional legislation”, where according to the generally accepted view, the element of

delegation that is present relates not to any legislative function at all, but to the determination of a contingency or event, upon the happening of which the legislative provisions are made to operate. The other class comprises cases of delegation proper, where admittedly some portion of the legislative power has been conferred by the legislative body upon what is described as a subordinate agent or authority. I will take up for consideration these two types of cases one after the other.

*237. In a conditional legislation, the law is full and complete when it leaves the legislative chamber, but the operation of the law is made dependent upon the fulfilment of a condition, and what is delegated to an outside body is the authority to determine, by the exercise of its own judgment, whether or not the condition has been fulfilled. "The aim of all legislation", said O'Conner, J. in *Baxter v. Ah Way* [8 CLR 626 at 637] "is to project their minds as far as possible into the future and to provide in terms as general as possible for all contingencies likely to arise in the application of the law. But it is not possible to provide specifically for all cases and therefore legislation from the very earliest times, and particularly in more modern times, has taken the form of conditional legislation, leaving it to some specified authority to determine the circumstances in which the law shall be applied or to what its operation shall be extended, or the particular class of persons or goods or things to which it shall be applied". In spite of the doctrine of separation of powers, this form of legislation is well recognised in the legislative practice of America, and is not considered as an encroachment upon the anti-delegation rule at all. As stated in a leading Pennsylvania case [*Locke's Appeal*, 1873 72 Pa. 491], "the legislature cannot delegate its power to make a law; but it can make a law to delegate a power to determine some fact or state of things upon which the law makes or intends to make its own action depend. To deny this would be to stop the wheels of Government. There are many things upon which wise and useful legislation must depend, which cannot be known to the law-making power and must, therefore, be a subject of inquiry and determination outside the halls of legislation".*

238. One of the earliest pronouncements of the Judicial Committee on the subject of conditional legislation is to be found in Queen v. Burah [5 IA 178] . In that case, as said already, the Lieutenant-Governor of Bengal was given the authority to extend all or any of the provisions contained in a statute to certain districts at such time he considered proper by notification in the Official Gazette. There was no legislative act to be performed by the Lieutenant-Governor himself. The Judicial Committee observed in their judgment:

“The proper legislature has exercised its judgment as to place, persons, laws, powers, and the result of that judgment has been to legislate conditionally as to those things. The conditions being fulfilled, the legislation is now absolute.”

239. Just four years after this decision was given, the case of Russell v. Queen[(1951) SCR 51] came up before the Judicial Committee. The subject-matter of dispute in that case was the Canadian Temperance Act of 1878, the prohibitory and penal provisions of which were to be operative in any county or city, only if upon a vote of the majority of the electors of that county or city favouring such a course the Governor-General by order-in-council declared the relative part of the Act to be in force. One of the contentions raised before the Judicial Committee was that the provision was void as amounting to a delegation of legislative authority to a majority of voters in the city or county. This contention was negatived by the Privy Council, and the decision in Queen v. Burah [5 IA 178] was expressly relied upon. “The short answer to this question”, thus observed the Judicial Committee, “is that the Act does not delegate any legislative powers whatsoever. It contains within itself the whole legislation on the matter with which it deals. The provision that certain parts of the Act shall come into operation only on the petition of a majority of electors does not confer authority or power to legislate. Parliament itself enacts the condition and everything which is to follow upon the

condition being fulfilled. Conditional legislation of this kind is in many cases convenient and is certainly not unusual and the power so to legislate cannot be denied to the Parliament of Canada when the subject of legislation is within its competency”.

240. *The same principle was applied by the Judicial Committee in King v. Benoari Lal Sarma [72 IA 27] . In that case, the validity of an emergency ordinance by the Governor-General of India was challenged inter alia on the ground that it provided for setting up of special criminal courts for particular kinds of offences, but the actual setting up of the courts was left to the Provincial Governments which were authorised to set them up at such time and place as they considered proper. The Judicial Committee held that “this is not delegated legislation at all. It is merely an example of the not uncommon legislative power by which the local application of the provisions of a statute is determined by the judgment of a local administrative body as to its necessity”.*

241. *Thus, conditional legislation has all along been treated in judicial pronouncements not to be a species of delegated legislation at all. It comes under a separate category, and, if in a particular case all the elements of a conditional legislation exist, the question does not arise as to whether in leaving the task of determining the condition to an outside authority, the legislature acted beyond the scope of its powers.” (emphasis supplied)*

61. With regard to delegated legislation the Supreme Court observed:

“243. *The essential legislative function consists in the determination or choosing of the legislative policy and of formally enacting that policy into a binding rule of conduct. It is open to the legislature to formulate the policy as broadly and with as little or as much details as it thinks proper and it may delegate the rest of the legislative work to a subordinate authority who will work out the details within the framework of that policy. “So long as a policy is laid down and a standard*

established by statute no constitutional delegation of legislative power is involved in leaving to selected instrumentalities the making of subordinate rules within prescribed limits and the determination of facts to which the legislation is to apply [Vide Schechter Poultry Corp.v. United State, 295 U.S. 495] .”

62. The Supreme Court in ***Basant Kumar v. Eagle Rolling Mills***, AIR 1964 SC 1260, held a similar provision to be a form of Conditional Legislation. In this case, Section 1(3) of the Employees’ State Insurance Act’ 1948 (ESI Act) was challenged on the grounds of excessive delegated legislation. It authorized the Central Government to notify the date of implementation of the the provisions of the Act. Section 1(3) of the ESI Act reads as follows: “(3) *It shall come into force on such date or dates as the Central Government may, by notification in the Official Gazette, appoint, and different dates may be appointed for different provisions of this Act and 1 for different States or for different parts thereof.*” Gajendragadkar, C.J., speaking for the Court upheld the validity of section 1(3) of the Act and held that section 1(3) of the ESI Act did not give excessive delegated legislative powers to the Central Government, because the said provision was a piece of Conditional Legislation and not a Delegated Legislation. It was held by the Court:

“4. The first point which Mr Chatterjee has raised before us is that Section 1(3) of the Act suffers from excessive delegation and, is, therefore, invalid. In order to consider the validity of this argument, it is necessary to read Section 1, sub-section (3):

“The Act shall come into force on such date or dates as the Central Government may, by notification in the Official Gazette, appoint, and different dates may be appointed for different

provisions of this Act and for different States or for different parts thereof.”

5. The argument is that the power given to the Central Government to apply the provisions of the Act by notification, confers on the Central Government absolute discretion, the exercise of which is not guided by any legislative provision and is, therefore, invalid. The Act does not prescribe any considerations in the light of which the Central Government can proceed to act under Section 1(3) and such uncanalised power conferred on the Central Government must be treated as invalid. We are not impressed by this argument. Section 1(3) is really not an illustration of delegated legislation at all; it is what can be properly described as conditional legislation. The Act has prescribed a self-contained Code in regard to the insurance of the employees covered by it; several remedial measures which the legislature thought it necessary to enforce in regard to such workmen have been specifically dealt with and appropriate provisions have been made to carry out the policy of the Act as laid down in its relevant sections. Section 3(1) of the Act purports to authorise the Central Government to establish a Corporation for the administration of the scheme of Employees' State Insurance by a notification. In other words, when the notification should be issued and in respect of what factories it should be issued, has been left to the discretion of the Central Government and that is precisely what is usually done by conditional legislation”(emphasis supplied)”

63. In *I.T.C. Bhadrachalam Paperboards* (Supra), the issue that came up for consideration before the Supreme Court was whether the order issued by the State Government in exercise of the power-to-exempt conferred by Section 11 of the Andhra Pradesh Non- Agricultural Lands Assessment Act, 1963 was a piece of Conditional Legislation, or Delegated Legislation. The further issue raised was, if it was Conditional Legislation, whether the same

could have retrospective operation. The Supreme Court considered the first of the aforesaid issues by observing:

“21. We may next consider the nature of the power under Section 11. The question is whether the power conferred thereunder is a species of delegated legislation or is it conditional legislation. The matter is no longer res integra. In Jalan Trading Co. (P) Ltd. v. Mill Mazdoor Union [(1967) 1 SCR 15 : AIR 1967 SC 691 : (1966) 2 LLJ 546] one of the questions raised and answered pertained to the nature of the power conferred upon the Government by Section 36 of the Payment of Bonus Act, 1965. Section 36 empowered the Government to exempt an establishment or a class of establishments from the operation of the Act provided the Government is of the opinion that having regard to the financial position and other relevant circumstances of the establishment, it would not be in the public interest to apply all or any of the provisions of the Act. Shah, J., speaking for the majority, held that:

“The power so conferred does not amount to delegation of legislative authority. Section 36 amounts to conditional legislation, and is not void.” (emphasis supplied)

It was further observed that:

“Condition for exercise of that power is that the Government holds the opinion that it is not in the public interest to apply all or any of the provisions of the Act to an establishment or class of establishments, and that opinion is founded on a consideration of the financial position and other relevant circumstances. Parliament has clearly laid down principles and has given adequate guidance to the appropriate Government in implementing the provisions of Section 36. ... Whether in a given case, power has been properly

exercised by the appropriate Government would have to be considered when that occasion arises.”

Hidayatullah, J., speaking for himself and Ramaswami, J., (minority opinion) did not say otherwise on this aspect. The learned Judge observed:

“The section cannot rightly be described as a piece of delegated legislation.”

22. In *Hamdard Dawakhana (Wakf) v. Union of India* [(1960) 2 SCR 671 : AIR 1960 SC 554] this Court dealt with the distinction between conditional legislation and delegated legislation. The following observations are apposite:

“The distinction between conditional legislation and delegated legislation is this that in the former the delegate's power is that of determining when a legislative declared rule of conduct shall become effective; *Hampton & Co. v. U.S.* [276 US 394 : 72 L Ed 624 (1927)] and the latter involves delegation of rule-making power which constitutionally may be exercised by the administrative agent. This means that the legislature having laid down the broad principles of its policy in the legislation can then leave the details to be supplied by the administrative authority. In other words by delegated legislation the delegate completes the legislation by supplying details within the limits prescribed by the statute and in the case of conditional legislation the power of legislation is exercised by the legislature conditionally leaving to the discretion of an external authority the time and manner of carrying its legislation into effect as also the determination of the area to which it is to extend; (*Queen v. Burah* [(1878) 3 AC 889]

; *Russell v. Queen* [(1882) 7 AC 829, 835 : 51 LJPC 77 : 46 LT 889] ; *King-Emperor v. Benoari Lal Sarma* [(1944) LR 72 IA 57 : AIR 1945 PC 48] ; *Sardar Inder Singh v. State of Rajasthan* [1957 SCR 605 : AIR 1957 SC 510] .) Thus when the delegate is given the power of making rules and regulations in order to fill in the details to carry out and subserve the purposes of the legislation the manner in which the requirements of the statute are to be met and the rights therein created to be enjoyed it is an exercise of delegated legislation. ***But when the legislation is complete in itself and the legislature has itself made the law and the only function left to the delegate is to apply the law to an area or to determine the time and manner of carrying it into effect, it is conditional legislation. To put it in the language of another American case:***

‘To assert that a law is less than a law because it is made to depend upon a future event or act is to rob the legislature of the power to act wisely for the public welfare whenever a law is passed relating to a state of affairs not yet developed, or to things future and impossible to fully know.’

The proper distinction there pointed out was this:

‘The legislature cannot delegate its power to make a law, but it can make a law to delegate a power to determine some fact or state of things upon which the law makes or intends to make its own action depend. There are many things upon which wise and useful legislation must depend which cannot be known to the law-making power, and must therefore be subject of enquiry and determination outside the hall of legislature.’ (In Lockes

Appeal[72 Pa 491] ; Field v. Clark [143 US 649 : 36 L Ed 294 (1892)] .)”

23. Hamdard Dawakhana [(1960) 2 SCR 671 : AIR 1960 SC 554] was, of course, a case where clause (d) of Section 3 of the Drugs and Magic Remedies (Objectionable Advertisements) Act, 1954 conferred upon the Government the power to specify by Rules made under the Act the diagnosis, cure etc. respecting which the advertisement of a drug was prohibited. The question before the Court was whether it is a case of delegated legislation or conditional legislation. The Court ultimately held that it belongs to the former category and is void being violative of Article 14 of the Constitution.

24. We may in this connection refer to the decision of the Supreme Court of United States in Field v. Clark [143 US 649 : 36 L Ed 294 (1892)] . The Tariff Act of 1890 empowered the President to suspend the operation of the Act, permitting free import of certain products within United States, on being satisfied that the duties imposed upon such products were reciprocally unequal and unreasonable. It was submitted that the said power transfers the legislative and treaty-making power to the President and, hence, unlawful. The attack was repelled holding that the President was a mere agent of the Congress to ascertain and declare the contingency upon which the will of the Congress was to take effect. The Court quoted with approval the following passage from an earlier case:

“The legislature cannot delegate its power to make a law; but it can make a law to delegate a power to determine some fact or state of things upon which the law makes, or intends to make its own action depend. To deny this would be to stop the wheels of Government. There are many things upon which wise and useful legislation must depend which cannot be known to the law-making power, and, must, therefore, be a subject of enquiry and determination outside the halls of the legislation.”

25. Reference may also be made to the decision of this Court in Tulsipur Sugar Co. Ltd. v. Notified Area Committee [(1980) 2 SCC 295] where the power conferred upon the Government by Section 3 of the Uttar Pradesh Town Areas Act, 1914 (2 of 1914) to extend the limits of town area was held to be a power in the nature of conditional legislation. It was held that the power was legislative in character and, therefore, the incidents applicable to an administrative order do not apply to it.

26. What is, however, relevant is that the power to bring an Act into force as well as the power to grant exemption are both treated, without a doubt, as belonging to the category of conditional legislation. Very often the legislature makes a law but leaves it to the executive to prescribe a date with effect from which date the Act shall come into force. As a matter of fact, such a course has been adopted even in the case of a constitutional amendment, to wit, the Constitution (Forty-fourth Amendment) Act, 1978, insofar as it pertains to amendment of Article 22 of the Constitution. The power given to the executive to bring an Act into force as also the power conferred upon the Government to exempt persons or properties from the operation of the enactment are both instances of conditional legislation and cannot be described as delegated legislation. (emphasis supplied)”

64. In the above light we may now examine whether the power of the Central Government to issue a Notified Order under Section 3 of the Act is a Conditional Legislation, or a Delegated Legislation. Under Section 3(1) of the Act, the Central Government is empowered to notify the applicability of the Extradition Act to a Foreign State. Thus, it is left to the wisdom of the Central Government to determine whether or not and, if so, when to issue a Notified Order in respect of any Foreign State subject to, inter alia, conditions. As observed hereinabove, extradition of a fugitive criminal is an

executive Act undertaken in discharge of a Sovereign Power. It is, thus, for the Central Government to determine when it deems it appropriate to extend the applicability of the Act to a given Foreign State and subject to what conditions etc. All that is left to the Central Government, is only to determine when the time is ripe to issue a Notified Order under Section 3 of the Act in respect of a foreign State and to lay down, inter-alia, the conditions subject to which the Act would so apply. Section 3 does not empower the Central Government to make any Delegated Legislation for carrying out the purpose of the Act i.e. for the smooth working of the Act. That power is conferred by Section 36, which confers the Rule making power on the Central Government.

65. Section 3(1) of the Act is in identical terms to Section 1(3) of the ESI Act, 1948 in as much, as, even under Section 3(1) of the Act, the Central Government is authorized to notify the applicability of the Act to a Foreign State. Thus, in our view, a Notified Order issued under Section 3(1) of the Act is also an instance of Conditional Legislation and not Delegated Legislation.

66. On the second aspect i.e. whether Conditional Legislation could be made retrospectively, the Supreme Court in *ITC Bhadrachalam Paperboards* (Supra) observed:

27. The next question is whether the power of conditional legislation can be exercised with retrospective effect. The decision of this Court in A. Thangal Kunju Musaliar v. M. Venkitachalam Potti, Authorised Official and ITO [(1955) 2 SCR 1196 : AIR 1956 SC 246] considered this question. The Travancore Legislature had enacted the Travancore Taxation

on Income (Investigation Commission) Act (14 of 1124). Section 1(3) “authorised the Government to bring the Act into force on such date as it may, by notification, appoint”. The Government issued a notification in exercise of that power on 26-7-1949 stating that the Act is brought into force with effect from 22-7-1949. The contention before this Court was that in the absence of an express provision in Section 1(2) authorising the Government to fix the date of commencement of the Act with retrospective effect, the Government had no power to say on 26-7-1949 that the Act must be deemed to have come into operation on 22-7-1949. This contention was negatived by the Constitution Bench of this Court in the following words:

“The reason for which the Court disfavours retroactive operation of laws is that it may prejudicially affect vested rights. No such reason is involved in this case. Section 1(3) authorises the Government to bring the Act into force on such date as it may, by notification, appoint. In exercise of the power conferred by this section the Government surely had the power to issue the notification bringing the Act into force on any date subsequent to the passing of the Act. There can, therefore, be no objection to the notification fixing the commencement of the Act on 22-7-1949 which was a date subsequent to the passing of the Act. So the Act has not been given retrospective operation, that is to say, it has not been made to commence from a date prior to the date of its passing. It is true that the date of commencement as fixed by the notification is anterior to the date of the notification but that circumstance does not attract the principle disavouring the retroactive operation of a statute. Here there is no question of affecting vested rights. The operation of the notification itself is not retrospective. It only brings the Act into operation on and from an earlier date. In any case it was in terms authorised to issue the notification bringing the Act into force

on any date subsequent to the passing of the Act and that is all that the Government did.”

67. In view of the decision in ***I.T.C. Bhadrachalam Paperboards*** (Supra), there is nothing illegal in giving retrospective effect to a Conditional Legislation. Thus, in our view, the Notified Order u/s 3(1) and 3(3)(a) of the Act is a piece of Conditional Legislation which can be given retrospective effect. There is nothing in the section which expressly, or impliedly, bars such retrospective operation. The Notified Order only seeks to make the Act applicable to the Republic of Philippines from the date of entry into force of the treaty in question- which is in terms of Article 21(1) of the said Treaty.

68. We now proceed to consider the issue that even if, for the sake of argument, the Notified Order issued under Section 3 of the Act were to be considered as a piece of Delegated Legislation, whether the same is valid or invalid. It is not that every piece of delegated legislation would be struck down as excessive, if the same were to be given retrospective effect. If the parent legislation either expressly, or by necessary implication, authorizes the delegate to give retrospective effect to the delegated legislation, such delegated legislation would be saved from attack on the ground that it exceeds the power to make delegated legislation.

69. We have already extracted hereinabove Section 3 of the Act. It is not in dispute that the Republic of Philippines is a Treaty State. Thus, sub-Section (3) of Section 3 comes into play. In respect of a Treaty State, the Notified Order “shall *not remain in force for any period longer than that Treaty*” (See Section 3(3)(b)). Moreover, the Central Government is

empowered to “*render the application of this Act*” subject to, inter alia, “*conditions and qualifications as may be deemed expedient for implementing the treaty with that State*”.

70. Thus, firstly, the Act itself provides that in respect of a Treaty State, the Notified Order shall not remain in force for any period longer than that Treaty, meaning thereby, that the Central Government could issue a Notified Order for the period during which the Treaty is subsisting. The starting point of the Treaty is the date of entry into force of the Treaty.

71. Moreover, the fact that the Central Government is empowered to lay down conditions and qualifications in the Notified Order as are deemed expedient, “*for implementing the treaty with that State*”, also shows that the Act empowers the Central Government to lay down any conditions or qualifications with the primary objective of implementing the Treaty with the concerned State while issuing the Notified Order.

72. The power of the Central Government to, inter alia, lay down conditions and qualifications is unrestricted, but the guiding factor in laying down, inter alia, the conditions and qualifications is that they should be deemed expedient for implementing the Treaty with the concerned foreign State. We have already noticed that extradition of a fugitive criminal is primarily a political/ executive act in discharge of the Sovereign power of the State. Thus, in our view, the scope of the power of the Central Government to lay down, inter alia, conditions and qualifications in the Notified Order has to be construed very widely, and the same takes within its meaning the power to issue a Notified Order with retrospective effect

provided, of course, that it shall not remain in force for any period longer than the Treaty itself. Thus, in any event, the Notified Order does not suffer from the vice of excessive delegation on the ground that the Central Government could not have given retrospective effect to the Delegated Legislation.

73. We may now proceed to consider the last argument of the petitioner. The petitioner has challenged the Notified Order dated 23rd August' 2016 on the ground that it has not been laid before either house of the Parliament in terms of Section 35 of the Act. He submits that section 35 of the Extradition Act, 1962 mandates that every Notified Order made or notification issued under this Act shall, as soon as may be, after it is made or issued, be laid before each House of Parliament. The question which, thus, arises is, whether the term "*shall*" used in section 35 renders the laying of the Notified Order u/s 3(1) before Parliament as mandatory or directory and what is the effect of the Notified Order in question not being laid before the two houses of Parliament.

74. The requirement of laying the Notified Order before the two houses of Parliament is an act of simple laying. Firstly, the laying of the Notified Order before the Parliament is not a pre- requisite to the enforcement of the Notified Order. It is a requirement subsequent to the issuance of such a Notified Order; Secondly, the provision does not empower the Parliament to make any modifications or amendments to the Notified Order which the Parliament may feel appropriate; Thirdly, it does not empower the Parliament to approve, or disapprove the Notified Order issued under the Act and, most importantly, it does not provide for any consequence for

failure to comply with the requirement to lay the Notified Order before both houses of Parliament. Lastly, the provision does not provide for a specific time frame within which the Notified Order is to be laid before each house of Parliament.

75. In *Atlas Cycle Industries Ltd. v. State of Haryana*, (1979) 2 SCC 196, the Supreme Court was considering the question: whether the Control Order and the notification issued under sub- section (1) of section 3 of the Essential Commodities Act, 1955, fixing the maximum selling price of a commodity was void for not having been laid before both Houses of Parliament, as mandated by sub- section (6) of section 3 of the Essential Commodities Act, 1955. Sub- Section (6) of section 3 of the Essential Commodities Act, 1955 provided as follows: “3(6) *Every order made under this section by the Central Government or by any officer or authority of the Central Government shall be laid before both Houses of Parliament, as soon as may be, after it is made*”. The court held that the requirement of laying before Parliament contained in sub-section (6) of Section 3 of the Essential Commodities Act is an act of simple laying and is, therefore, directory not mandatory. The court observed:

“22. Now at p. 317 of the aforesaid Edition of Craies on Statute Law, the questions whether the direction to lay the rules before Parliament is mandatory or merely directory and whether laying is a condition precedent to their operation or may be neglected without prejudice to the effect of the rules are answered by saying that “each case must depend on its own circumstances or the wording of the statute under which the rules are made”. In the instant case, it would be noticed that sub- section (6) of Section 3 of the Act merely provides that every order made under Section 3 by the Central Government

or by any officer or authority of the Central Government shall be laid before both Houses of Parliament, as soon as may be, after it is made. It does not provide that it shall be subject to the negative or the affirmative resolution by either House of Parliament. It also does not provide that it shall be open to the Parliament to approve or disapprove the order made under Section 3 of the Act. It does not even say that it shall be subject to any modification which either House of Parliament may in its wisdom think it necessary to provide. It does not even specify the period for which the order is to be laid before both Houses of Parliament nor does it provide any penalty for non-observance of or non-compliance with the direction as to the laying of the order before both Houses of Parliament. It would also be noticed that the requirement as to the laying of the order before both Houses of Parliament is not a condition precedent but subsequent to the making of the order. In other words, there is no prohibition to the making of the orders without the approval of both Houses of Parliament. In these circumstances, we are clearly of the view that the requirement as to laying contained in sub-section (6) of Section 3 of the Act falls within the first category i.e. “simple laying” and is directory not mandatory. We are fortified in this view by a catena of decisions, both English and Indian....” (emphasis supplied)”

76. In *ITC Bhadrachalam Paperboards* (Supra) as well, the Supreme Court considered the similar issue i.e., whether the requirement of “laying” before legislature is mandatory, and relied upon *Atlas Cycle Industries Ltd.* (Supra).

77. To the same effect are the discussions of the Supreme Court in *State Represented by Inspector of Police, Chennai vs. N.S. Gnaneswaran* (2013) 3 SCC 594, and *Veneet Agrawal v. UOI and Ors*, (2007) 13 SCC 116. In the light of the above settled legal position and the language of Section 35 of the Act, clearly, the requirement of “laying” before Parliament is merely

directory and not mandatory. Failure to lay the Notified Order before the two houses of Parliament does not invalidate the Notified Order.

78. In the aforesaid light, we are of the considered view that the decision of the Division Bench of this Court in *Marie Emmanuelle 1* (supra) is of no avail to the petitioner, since the Notified Order extending the applicability of the Act to the Republic of Philippines was, in law, in force on the date when the request for extradition was received by the Central Government on 04.08.2016.

79. Since the judgment of the Division Bench in *Marie Emmanuelle 1*(supra) has been cited before us and extensively relied upon by the petitioner, and we have had occasion to examine the same, we consider it appropriate to make our observations regarding the same. With the utmost respect to the Division Bench that decided *Marie Emmanuelle 1*(supra), we are of the opinion that the finding returned by the Division Bench and relied upon by the petitioner, namely, that the letter of request issued by the Republic of Chile itself was invalid on the ground that there was no Notified Order in existence on the date when the letter of request/ *aide-memoire* was received by the Central Government, and the subsequent issuance of the Notified Order would not make any difference to it, may not be legally correct and may need reconsideration in an appropriate case.

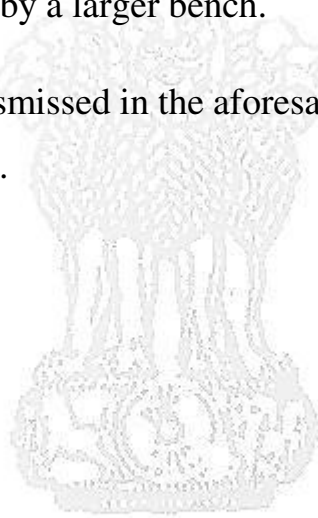
80. We say this for the reason that, firstly, a foreign State – whether a Treaty State or a non-Treaty State, is not precluded from making a request for extradition in exercise of its own sovereign power to the Republic of India. Making of such a request for extradition by any foreign State is not

subject to, and conditional upon, the issuance of a Notified Order under Section 3 of the Act in relation to that foreign State. Secondly, Section 3(1) when read in conjunction with Section 3(3) of the Act clearly shows that Section 3(1) is wider in its application and scope in as much, as the Central Government may issue a Notified Order in respect of any foreign State which may, or may not, be a Treaty State. However, when the Notified Order relates to a Treaty State, the requirements of Section 3(3) should be fulfilled. Section 3 (1) of the Act empowers the Central Government to issue a Notified Order so as to apply the provisions of the Act to such foreign State as may be specified in the Notified Order. The Act becomes applicable to a foreign State – in the sense that the request for extradition would be dealt with in accordance with the provisions of the Act, once a Notified Order is issued under Section 3(1) thereof in respect of that foreign State. A perusal of Section 3 of the Act shows that while Section 3(1) and 3(2) relate to all Foreign States, Section 3(3) relates to treaty States only. Thirdly, as noticed hereinabove, the Supreme Court in *Marie Emmanuelle* 2(supra) has held that even if there is no binding extradition Treaty between India and a foreign State, the requisition for extradition made by the said foreign State would be maintainable under the general principles of reciprocity and the general principles of international law for extradition. The Supreme Court held that “*the general principles of international law do not debar the requisition*”. Fourthly, Section 4 of the Act lays down the manner in which the request for surrender of a fugitive criminal of a foreign State may be made to the Central Government. The same does not state that the requisition for surrender can be made only by that Foreign State, in respect whereof a Notified Order under Section 3(1) has been issued.

Fifthly, it is not even contemplated by the Act that as soon as a request for extradition is received by the Central Government from a foreign State, the fugitive criminal should be extradited forthwith. Thus, even after a request for extradition is received, and while the same is pending consideration, it is open to the Central Government to issue a Notified Order under Section 3 of the Act in respect of the request of a foreign State.

81. However, since the aforesaid judgment does not come in our way in disposing of the present petition, we are refraining from referring the said decision for reconsideration by a larger bench.

82. The petition stands dismissed in the aforesaid terms leaving the parties to bear their respective costs.



(VIPIN SANGHI)
JUDGE

(I.S. MEHTA)
JUDGE

JANUARY 08, 2019